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BY

F. M. GOADBY, Esq., D.C.L.

Let observation, with extensive view,
Survey mankind from China to Peru.
SAMUEL JOHNSON.

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ONE HUNDRED YEARS OF LEGISLATIVE DEVELOPMENT IN NEW ZEALAND.

[*Contributed by* THE HON. H. G. R. MASON, *Attorney-General and Minister of Justice, New Zealand.*]

IT is difficult to say exactly when the territory of New Zealand became subject to legislative authority. A Royal Proclamation published in Sydney on January 18, 1840, extended the boundaries of New South Wales to include at least part of the islands of New Zealand, but it is now generally agreed that the Crown assumed sovereignty over the whole territory some months before that, so importing into New Zealand the common law of England.[1] However, for about two years the country was governed from Sydney, and during that time various enactments of the New South Wales legislature referred specifically to New Zealand. The two were separated by a Royal Charter issued under the authority of 3 & 4 Vict. c. 62 on November 16, 1840, and the legislature of the new Colony was authorized to make laws for " the peace order and good government of New Zealand."

This body, based on the model of New South Wales, was composed of a Governor, appointed by the Crown, and a Legislative Council of six nominated persons, three being officials and three settlers. In accordance with usual colonial practice, the Governor had the sole right to initiate legislation, which could be, and not infrequently was, disallowed by the Crown. Owing to the lack of communication between the scattered settlements of the new territory, this form of government did not give complete satisfaction, and in 1846 a new Constitution was obtained from Westminster. This authorized the division of New Zealand into two or more provinces, each with an Assembly consisting of a Governor, a nominated Legislative Council, and a House of Representatives

[1] On this point, and as to early constitutional law generally, see Foden, *The Constitutional Development of New Zealand*, 1839–1849 (L. T. Watkins Ltd., 1938), and Hight and Bamford, *The Constitutional History and Law of New Zealand* (Whitcombe & Tombs Ltd., 1914).

elected by the local bodies that had recently been set up among the immigrant communities. A central General Assembly was to be similarly constituted, the members of its House of Representatives being appointed by the Houses of the several Provinces from their own members. These never came into existence, however, for although a Charter was issued dividing the Colony into the two Provinces of New Ulster and New Munster, Governor Grey, who was alarmed at the narrow franchise on which these institutions were based, persuaded the British Government to suspend the main portions of the new Constitution for a period of five years.

A form of representative government was attained in 1852, when an Imperial Act made provision for a General Assembly, and for subordinate legislatures for each of the six Provinces into which the country was then divided. The whole of the Provincial Legislatures, consisting of a Superintendent and Legislative Council, and enjoying a limited legislative competence, and the lower House of the bicameral General Assembly, were to be elected by persons possessing a property qualification. This arrangement persisted till 1876, when the Provincial Legislatures were abolished. Since that time many important changes have been wrought—notably in the widening of the franchise—but the operative machinery of government remains very much the General Assembly as it was constituted in 1852.

Periods of Legislation.—It is possible to divide the legislative history of New Zealand into a number of fairly well marked periods. (1) The first is the Legislative Council period, when the foundations of the Colony's legal and judicial system were laid by an officially appointed body. (2) This was replaced by an Elective Assembly, which for almost four decades was engaged mostly in day to day legislation and administration, and passed little that is of great legal significance, though some of its work foreshadowed the extension of Governmental activities that was shortly to come. (3) From 1891 to 1912 the Treasury benches were occupied by a series of Liberal-Labour Governments that were radical and empirical in temper. The early part of this period is the first of New Zealand's great chapters of liberalism, when much that was written into the law was novel and has since been adopted in other countries. (4) Towards the end of the period, however, the experimental spirit tapered off, and the return to office of a Conservative Ministry in 1912 is not sharply marked in the Statute-book. This Government, and others of the same type that succeeded it, showed little legislative originality. They were content to follow any lead given by the

Imperial Parliament, but showed no enthusiasm for exploring new paths themselves, until the impact of the depression in 1931 forced the resort to trial-and-error remedial methods. (5) These had met with little success when the present Labour Government, on assuming office, set out to woo recovery with different methods, ushering in a period of social legislation that is in a direct line of succession to the progressive era that marked the turn of the century.

Work of Legislative Council.—The work of the first Legislative Council is in great part a monument to William Swainson, Attorney-General during the period when it was the sole deliberative body. He travelled out to New Zealand in company with William Martin (the first Chief Justice of the Colony) and Thomas Outhwaite, a solicitor, who was later to become Registrar of the Supreme Court at Auckland, and the three of them spent much of the long voyage together considering and drafting legislation which could be introduced on their arrival. Despite a natural conservatism and a "legalistic" turn of mind, Swainson had little patience with the traditionally verbose language of the law, and he was responsible for the simple directness with which the legislature of those days spoke. Good examples of this are to be found in the Ordinances setting up a judicial system and in the Conveyancing Ordinance, all passed in the second session of the Legislative Council. The purpose of the latter was to clear away the fungus of technicalities that has fastened itself upon the law relating to the transfer of property in England. Such subtleties as the rule in Shelley's Case, the rule as to double possibilities, or any of the solemn ritual that surrounded the execution of deeds, had no place in a country untroubled with an historic past, and in a few clear and concise words a lot of dead wood was cut away. It is interesting to compare this Ordinance with two Conveyancing Acts passed by the Imperial Parliament a year or so later in 1844 and 1845.[1] Both of these had the same general purpose as that of the New Zealand Ordinance, simplifying the law of property, and the second was drafted by two of the most eminent conveyancers of the day, but nevertheless they bristle with cautious and garrulous tautologies, and make difficult reading beside the crisp simplicity of the New Zealand Ordinance.

Apart from carefully planned material of this kind, much of the early legislation of New Zealand, like that of any young colony, was frankly experimental and dictated by circumstances. A remarkable feature of it, perhaps, is the amount that dealt with what has become

[1] 7 & 8 Vict. c. 76 and 8 & 9 Vict. c. 106.

known in America as "lawyers' law." One would have thought that the circumstances of the time called for little beyond the regulation of daily frontier life, but approximately one-third of the total number of Ordinances dealt with such things as copyright, building societies and the minutiæ of legal procedure. Particularly noticeable was the experimentation in different types of courts. In contrast to the history of most of the early American settlements, where the expert was distrusted and a popular court dispensed rough but common-sense justice to all-comers, New Zealand set up in quick succession a Supreme Court, Courts of Requests, of Quarter Sessions, of Sessions of the Peace, of Appeal, of Arbitration and of Sessions, and Coroner's and Magistrate's Courts, each with its own detailed procedure and in most cases with the right of audience limited to persons entitled to practise in the Home Country. The keystone of the present judicial structure is the Supreme Court, which exercises as a court of first instance the fullest possible jurisdiction. It also hears appeals from the principal inferior court —the Magistrate's Court, which exercises a jurisdiction that is in some respects greater and in others smaller than England's County Court ; and in criminal cases corresponds to the English Court of Petty Sessions. This is usually presided over by a stipendiary magistrate, but sometimes two or more justices of the peace make up the bench. From the Supreme Court recourse may be had (subject to certain limitations) to the Court of Appeal (staffed by the judges of the Supreme Court sitting in two divisions) and thence to the Judicial Committee of the Privy Council. The Arbitration Court, which will later be described more fully, interprets industrial agreements, the Compensation Court hears workers' compensation cases and the Warden's Court adjudicates disputes relating to mining claims.

The disturbed state of the Colony accounted for other legislation, such as provision for a militia and an armed constabulary, and the regulation of firearms and gunpowder. But the main question which was absorbing the attention of the whole Colony was that of land purchase and distribution. The chief difficulty was that many settlers were claiming huge tracts of land which they alleged had been purchased from the Maoris before New Zealand became a British Colony, while the Maoris stoutly denied their intention to sell. Consequently the first act of the Legislative Council, after confirming the implied adoption of certain New South Wales laws to New Zealand, was to pass the Land Claims Ordinance, invalidating all

title to lands except those allowed by the Crown. It authorized the appointment of a Commission to consider land claims and to make recommendations to the Government. This was really an investigatory measure of a temporary nature, but various attempts which were made in succeeding years to replace it with something more permanent were unsuccessful for one reason or another, and it persisted right throughout the Crown Colony period.

Elective Assembly.—The first elected Parliament of the Colony of New Zealand yielded much excitement but little legislation. The grant of an Elective Assembly had only partially satisfied the settlers, who now used this weapon to demand a Government fully responsible to the electors. In their view the new Assembly was only a talking shop so long as it lacked control over the Executive Council. This body was made up of officials appointed by the Colonial Office, and once having been granted supply, it could defy Parliament. From 1854 till 1856, in a struggle punctuated by frequent prorogations and changes in the leadership of the House, this question was fought out, and not until the Governor, acting on the instructions of the Colonial Office, acceded to the settlers' demands, did the legislature settle down to dealing with the needs of the Colony.

One matter that required urgent attention was the extent to which English law had been imported into the country. On the assumption of sovereignty by the Crown the law of England, both statute and common, was assumed to extend to New Zealand so far as applicable, but as the date of that event was not certain an official pronouncement of some kind was necessary. The second Parliament declared that two or three specific Acts of the Imperial Parliament should extend to New Zealand, and then passed the English Laws Act, 1858, which enacted that the Laws of England existing on January 14, 1840, should, so far as applicable, be deemed to be in force in the Colony on that date. That did not end the matter, however, and a Commission which was appointed in 1879 to prepare an edition of the Public General Statutes then in force was instructed to include "such enactments of the Imperial Parliament in force in the Colony as from their general interest and importance the Commissioners think desirable." In the end they produced a separate book of " Imperial Acts in force in New Zealand " which has been of great assistance to practitioners; but it is in no way exhaustive, and even to-day it is still an open question whether many early English statutes are binding on the courts of New Zealand.

A parallel question was the applicability of English rules of procedure. The Supreme Court that had been set up in the Colony enjoyed unlimited jurisdiction in point of subject-matter, combining the jurisdiction of the three common law courts at Westminster, the equitable, ecclesiastical and other jurisdiction of the Lord Chancellor and full Admiralty competence. (To-day this seems to us the most elementary wisdom on the part of the early settlers; but in other colonies, no bigger than New Zealand, separate courts were set up to deal with common law, equity and other business, and persist even to this day.) In view of the variety of principles evolved in these forums, there was for some time great confusion and uncertainty as to the correct procedure in matters coming before the New Zealand court, and a judicial commission was appointed to consider the matter and to formulate a practicable set of rules, the result being the Supreme Court Procedure Act, 1856. A praiseworthy feature of this was the direction that in cases not specifically provided for, English rules were not to apply (which would, of course, have wrecked the whole thing) and that a practitioner should in such circumstances " take such course as shall appear to him most in accordance with these regulations."

In spite of this, the Rules of 1856 reproduced in codified form all the technicalities that marred the English practice of that time. In 1883, following the investigation and recommendation of a Royal Commission, there came into being a new and simplified Code which has since undergone few major changes. It followed the simplification introduced into English practice shortly before by the Judicature Act, by eliminating the need for the use of certain ritual words and forms, and broke finally from the old tradition of *ubi remedium, ibi jus.*

The other work of this Parliament is not particularly notable. The first signs of commercial development in the Colony are indicated by the Special Partnerships Act, conferring the benefit of limited liability on certain undertakings, and followed later in the session by the Joint Stock Companies Act ; the Mercantile Law Amendment Act following the contemporary English Act of the same name ; and the Married Women's Property Protection Act, which was the first step towards economic emancipation of wives. Two Acts that were rather daring for their time were the Absent Defendants Act and the Absent Debtors Act, of 1858, giving the right to serve process out of New Zealand and to pronounce and execute judgment on certain defendants despite their absence beyond the jurisdiction.

They show that even at that early stage the legal advisers of the New Zealand Government (and also, of course, of the British Government, which did not disallow the Acts) had no inclination to place a narrow interpretation on their power to legislate for " the peace, order and good government of New Zealand."

Land Transfers.—In 1860 the first step in the direction of our present method of proving title was made with the Land Registry Act, 1860. Up till that time, in accordance with English conveyancing law and practice, the title of a proprietor of land consisted of a chain of deeds tracing his ownership back to a Crown grant or other root title, all of which were subject to minute and laborious scrutiny on every dealing with the land. This Act introduced the central feature of what has come to be known as the Land Transfer or " Torrens " system, the substitution for this chain of a simple indefeasible certificate of title, issued to the " registered proprietor " by a Government officer after he had satisfied himself of the proprietor's claim. For some reason, however, this Act was never popular, and in 1870 it was replaced by the Land Transfer Act, which adopted the rest of the Torrens system, so enthusiastically received in the Australian Colonies. The new Act was an immediate success, though the differences were not great—for instance, certificates of title were now made out in duplicate, one being issued to the owner and one retained in the Office, being bound with others to form the Register Book : again, a mortgage under the old plan was noted on the register, but not on the owner's certificate, and a certificate of charge given to the mortgagee : the new system required mortgage deeds to be presented in duplicate together with the certificate of title, which, when endorsed with a memorandum of the charge, was returned to the mortgagee with one copy of the deed.

This is not the place for a description of the operation of the Torrens system, which, though not in operation in England, is widely known there. It is sufficient to say that this Act and others which have amended and re-enacted it have furnished New Zealand with a system of publishing and safeguarding land dealings which is simple, effective and somewhat less costly. So successful has it been that in 1924 an Act was passed providing for the compulsory registration of all land which had not up to that time been voluntarily brought on the Register, limited certificates of title not enjoying the guarantee of the State that ordinary titles carried being issued until the necessary surveys were made and outstanding deeds surrendered. It was hoped that this would be completed within

five years, but it has proved a big job, and there are still a number of isolated parcels of land that call for the intricacies and learning of common law conveyancing.

For some time after this Parliament was occupied with routine legislation which is of little interest to the outside world. Passing notice should perhaps be made of the Post Office Savings Bank Act, 1865, following the similar English Act of 1861. This Act authorized the Postmaster-General to receive deposits from the public, and the popular response was so great that his functions have been continuously increased as the organization under his control grew into the great national institution of to-day.

State Ownership of Public Utilities.—The type of policy for which New Zealand was soon to become famous—the State ownership of public utilities and services—first showed itself on the Statute-book around about 1870. As early as 1865, when telegraphy was barely out of the laboratory stage, an Act was passed authorizing the Government to construct and operate telegraph services, and a few years later the power to take over existing lines was added, resulting in a Government monopoly so cheap and popular that New Zealanders send more telegrams per head than any other people in the world. Telephone and electric light services were brought under the same control in 1884.

In 1869 the Government was authorized to accept life insurance proposals through the Post Office Savings Bank, a separate Government Life Insurance Department later being created to deal with the increase in business, and in 1870 an historic step was taken when the Railways Act was passed. It was just about this time that most of the defects of the private construction of railways were becoming apparent in older countries, where lines often with different gauges were laid down solely with a view to profit and not for the development of the country, and there was much support for the proposal that New Zealand railways should be laid out at the command of the State in accordance with a definite plan for the benefit of the country as a whole. Economic values have changed, and a shift in the density of population has occurred since that time, with the result that the plan of 1870 is not perhaps the plan of 1940, but there is no doubt that New Zealand has obtained full value for the money she spent on Government-owned railways.

A more radical departure was the creation in 1872 of a Public Trustee. It is believed that New Zealand is the first country to

have appointed a Government official with power to be appointed as executor or administrator of deceased persons' estates, and as guardian and controller of trust funds, both public and private. Certainly it is a practice that is now most widespread, but no record exists in New Zealand of any foreign precedent for the Act of 1872.

Inheritance.—New Zealand inherited from England her system of inheritance, with its different rules governing the descent of personalty and realty. Primogeniture, the main feature of the law relating to the descent of real property, had roots in the feudal system, and was the legal reflection of a landed aristocracy. Lacking such a class, New Zealand found the complications of English law an unnecessary nuisance, and in 1874 the Real Estate Descent Act partially abrogated the difference between the two systems of descent. Five years later the principles governing the descent of personalty, modified so as to give to a surviving wife the share that a surviving husband would have taken, were applied to all forms of property, resulting in a great simplification of the administration of deceased estates, as England discovered when the Property legislation of 1925 effected a similar change there.

First Offenders.—A measure of some considerable social significance was the First Offenders Probation Act of 1886. This was originally prompted by experiments that had been made in some American jurisdictions in the treatment of youthful delinquents, and the first draft of the Bill was altered to incorporate parts of a Bill that had been introduced into the English House of Commons the previous year but which was crowded out at the end of the session. As the name implies, it empowered the courts to place first offenders under the supervision of probation officers as an alternative to sending them to mix with more seasoned criminals in gaol. This power is, of course, no longer limited to first offenders.

No further legislation of great significance was passed until John Ballance led a Liberal Government into office in 1891, and the tide of reform began to flow even more swiftly when his death in 1893 left Richard Seddon to lead the Government. Without bothering too much about definition of terms, we may group the legislation of this period under four heads, Industrial, Social, Economic and Legislative.

Industrial Legislation.—The monumental achievements in the industrial sphere, which gave New Zealand workers the best conditions in the world for this time, were the Factories Act, the Shop

and Shop Assistants Act and the Industrial Conciliation and Arbitration Act, all passed in the early part of this period. These Acts have frequently been commented on and were long held up as models to other countries, and the last in particular contained the machinery for what has become known as "the New Zealand system of Industrial Relations." Its main purpose was to substitute conciliation for coercion and the judgment of an independent tribunal for the strike or lock-out. An agreement concluded between employers and a union of workers registered under the Act had the force of a binding charter, and any industrial dispute arising thereunder was settled, not by methods of direct action, which were made illegal in any industry covered by such an agreement, but by reference first of all to a Conciliation Board, and then, if no agreement could be reached there, to the Court of Arbitration consisting of a judge of the Supreme Court as President and a workers' and an employers' representative. There was (and still is) no compulsion of a union to register, in which case it could still exercise the strike threat as a bargaining weapon, but the large majority of unions adopted the Act and before long industrial agreements were in existence which provided a code for most crafts extending sometimes over the whole country and sometimes within a defined district.

The other Acts provided for a 45-hour week with statutory holidays, minimum wages for young persons and other labour safeguards that in most of the older countries did not receive the authority of legislation until well on in the twentieth century, and in some cases not even yet.

Social Legislation.—Complementary to these Acts was the social policy of the Government, evidenced by superannuation schemes for public employees, a progressive and generous land settlement policy, and most of all by the Old Age Pensions Act, 1898. The terms of this would not measure up to present accepted standards, but for its time it was a remarkable advance. Prior to that date the New Zealand Government, in common with all others, saw no reason to go beyond the day-to-day relief of dire poverty, and paid a subsidy on all amounts raised by local authorities for the purpose of maintaining the aged and needy. This Act, though betraying in its language and strict limitations the reproachful attitude towards "the poor" that was universal in the nineties, admitted the obligation of the State to care for such of its citizens as had not, throughout a lifetime of work, been able to provide for their old age. Instead of

waiting until an applicant was absolutely destitute before supplying relief, this new Act permitted old people to have a certain amount of property and income and yet still draw the full pension. True the limits were not large, but the principle was new and soon spread throughout the world.

Economic Legislation.—On the economic side little more need be said than that during this period the Government entered the coal mining industry by buying up a number of mines and operating them itself, and by setting up a State Accident Insurance and later a State Fire Insurance Agency. In none of these fields has the Government established a monopoly even to-day, but it has had considerable effect in reducing rates and regulating private enterprise.

Law Reform.—The most interesting developments from the point of view of the lawyer, however, are the Criminal Code of 1893, the Divorce Acts and the Testator's Family Maintenance Act, 1900. For some years after the foundation of the Colony, the criminal law of England was, apart from a few minor statutory alterations, applicable to New Zealand. That law, which had been repeatedly condemned by judges, Royal Commissions and other authorities in England, was quite unsuitable to New Zealand, and it was a great step forward when the vague and conflicting rules were harmonized in the Criminal Code Act, 1893. That Act, based on Fitzjames Stephens' well-known draft, swept away all the artificial anomalous distinctions and useless antiquated forms that obstructed the path of justice, and greatly simplified the law by a series of clear, exact and concise definitions of various crimes. All crimes are now statutory, indictments are less formal and may with the consent of the court be amended, and such things as penal servitude, demurrers, the distinction between felonies and misdemeanours and between principals and accessories have all been abolished. The thicket of technical difficulties that concealed the law relating to and distinguishing between larceny and embezzlement has been cleared away by making them both varieties of theft.

The first Divorce Act in New Zealand was passed in 1867. This largely reproduced the law of England and restricted the grounds on which a divorce might be sought to adultery in the case of a wife, and adultery plus cruelty or sodomy or other grave offence in the case of a husband. This was liberalized in 1898 when the conditions were as far as possible made the same for both sexes, and five years' desertion, four years' habitual drunkenness, and conviction

and imprisonment for attempting to take the petitioner's life were added. An amendment in 1907 added the murder of a child and incurable insanity (with certain restrictions). The result was to make the law of divorce more rational in New Zealand than in other parts of the British Empire, a tradition that has since been maintained by the reduction of the desertion period to three years and the creation of three years' mutual separation and the failure to comply with a decree for restitution of conjugal rights as grounds for divorce.

Testator's Family Maintenance.—In another field of family law New Zealand led the British Empire with legislation designed to protect dependants from being capriciously disinherited. The requirement that a certain proportion of the estate of a deceased person should automatically go to any wife, husband or children that might survive is, of course, common in other legal systems, but rather than adopt this somewhat casual method, New Zealand tried a new tactic with the Testator's Family Maintenance Act, 1900. That was a short Act conferring on the Supreme Court the power to order provision to be made out of the estate of a deceased testator for a wife, husband or children of the testator if he had failed to make adequate provision for them. The Act originally had no application to intestacies, as these people were presumed then to get their fair share of the estate in accordance with the Statute of Distribution (though this is not always so, and in 1939 the Act was extended to cover intestate estates). The aim of the Act is not, however, to achieve a "fair" distribution, but merely to ensure that dependants are not maliciously and needlessly left impecunious, and accordingly it involves as little interference as possible with the free discretion and desires of the testator.[1]

Consolidation of the Law.—An interesting piece of legislative work was the consolidation that took place in 1908. Before that time the statutory law of New Zealand was to be found in some forty-seven volumes containing the enactments from 1840 onwards, much of it spent, repealed and otherwise obsolete. A Commission was set up to examine these, assimilate amendments and remove the useless matter, and the result of their labour was compressed into five large volumes containing the whole of the extant public enactments in a readable form, up-to-date and free from amendment. These were attached as a schedule to the Consolidated Statutes Enactment Act,

[1] See Stephens, *Testators' Family Maintenance* (Butterworth, 1934), and a note by W. A. Robson in (1938) *Modern Law Review*, vol. i, p. 304.

1908, and on its coming into force each of the consolidations received authority as an enactment of 1908, so that to-day, although some of the work of the pioneer legislators remains in force unaltered, no public Act is ever dated earlier than that year. By 1931, the Statute Law was again becoming unwieldy, and a private firm, with official blessing, prepared a reprint similar to Halsbury's *Statutes of England*, in which amendments were incorporated in principal Acts but the latter were not re-enacted.

The Great War and After.—The Conservative Government that followed the Liberals lived between two crises. Shortly after it took office the country was involved in some major labour disputes which were still not completely settled when the Great War broke out. For the next half-dozen years the Government was fully occupied in the prosecution of the war and the subsequent transition from military back to civilian life. There followed a period of uneasy prosperity when pensions were increased and the policy of land settlement and of Government advances for workers' homes extended; but even in the twenties the spectre of unemployment was looming and social legislation was small in quantity. From the legal point of view the outstanding achievement is the Motor Vehicles Insurance (Third Party Risks) Act, 1928. This Act involved a courageous departure from accepted principles, and by stretching the law of contract to the utmost gave to persons injured by motor vehicles a much more certain method of redress than the English legislation of two years later.[1] In fact, short of imposing absolute liability upon motorists for road accidents, it is hard to imagine how road-users could be more adequately protected. Our experience has disproved fears that have been expressed in other countries when similar legislation is under consideration, and this Act is well worth the study of those interested in the problem of road accidents.

The gathering economic gale blew the Conservatives out of office and brought back the ghost of the Liberal Party, but eventually they bowed to the storm and sought support in a coalition with their predecessors, following the creation of the National Government in England. Throughout the period of the depression the Government and people were fully occupied with economic matters, and nothing of particular legal significance was recorded in the Statute-book.

[1] For details of this Act see Chorley and Finlay, "Third Party Insurance" (1938, *Modern Law Review*, vol. ii, p. 36).

In 1935 the present Labour Government was returned to power and brought to the country's problems a different social philosophy. Its programme and economic achievements have been sufficiently commented on elsewhere,[1] and only such of its legislation as is of legal as well as social interest need be mentioned here.

Industrial Arbitration.—Probably the most far-reaching changes were those made in the Industrial Conciliation and Arbitration Act. The essential feature of this Act had been that workers subject to its jurisdiction gave up the right to strike in favour of an award by the Arbitration Court, and for nearly fifty years the worker's standard of life had been maintained without the need for militancy in the trade unions. During the depression this safeguard was removed, recourse to the court being made optional instead of compulsory, and the unions, suddenly exposed to the blast of industrial strife, found it very withering indeed. The Labour Government restored the old practice, and made a number of other very important changes in the industrial sphere, which can be no more than enumerated here :

1. The formation of new unions in industries already covered was restricted and a majority of district unions permitted to register a national union covering all existing members, thus doing much to eliminate the parochial jealousies that always crop up in labour movements.

2. The hiring of non-union labour in any industry covered by an award was prohibited. The result was, in effect, compulsory unionism for all workers and closed shops in all industries except in special cases (*e.g.* domestic servants, workers on commission, etc., have not been organized into unions).

3. The court was instructed to fix a basic wage, reviewable every six months and sufficient to provide a reasonable standard of living for a married man with three children, which was to be the minimum wage for all adult workers, married or unmarried, and skilled or unskilled.

4. Unless such a provision would make it impracticable to carry on an industry, all future awards were to provide for a forty-hour week, with Saturdays free.

5. Better provision was made for agricultural workers who had formerly received no protection from the Arbitration Court. A forty-hour week was impossible in their case and alternative

[1] For details see Lee, *Socialism in New Zealand* (Laurie, 1938), and Sutch, *New Zealand's Labour Government at Work* (L.I.D. Pamphlet, N.Y., 1940).

provision was made for one month's holiday a year on full pay.

Social Security.—Other legislation increased old-age and other pensions, and introduced invalidity pensions, so giving State relief to persons who by reason of accident, illness or congenital defect were so incapacitated as to be dependent on their relatives or on charity. These provisions were later incorporated in the Social Security Act of 1938, which is probably the most far-reaching piece of social legislation ever passed in any country in the world. It has not yet been put into complete operation, owing to a number of factors, such as a disagreement between the Government and the medical profession and the onset of the war, but the scheme is gradually being introduced, and its thorough implementation is still an urgent item in the Government's policy despite the country's whole-hearted preoccupation with the necessity of winning the war.

Once again there is no space to do anything but note the main points envisaged by the Act :

1. All pensions brought under the one control, made partly contributory and in most cases increased, *e.g.* old-age pensions increased from the pre-labour level of £45 10*s.* to £78 per annum, and the age limit reduced from 65 to 60 ; invalid's pension for any man permanently incapacitated for work, at the rate of £78 per annum plus a further £26 for his wife and each dependent child.

2. A comprehensive insurance scheme instituted, covering financial loss occasioned by sickness, accident, widowhood, orphanhood, unemployment, etc., and provision is also made for an emergency benefit to cover exceptional cases.

3. A universal old-age benefit, which may be claimed by anybody with the necessary residential qualification, irrespective of property or income. The first payment of £10 is being made this year and the amount is to be progressively increased until the maximum of £78 is reached in 1967.

4. On the health side it is proposed, in addition to the free in-patient, maternity and mental hospital services now in operation, to provide a universal general practitioner service free to all members of the community requiring medical attention, free hospital and sanatorium treatment and free medicines. Nor is this the limit of the scheme : when these objectives have been achieved the Government proposes to make arrangements for other free services—specialist and consultant, home nursing and domestic assistance, dental, ambulance, radiological and laboratory service.

Economic Measures.—All these provisions are balanced by equally radical legislation relating to the economic life of the country, though these are not perhaps of so much interest to the lawyer. The whole life of New Zealand is built upon her export of primary products, mainly to the United Kingdom. The mechanism through which this trade operates has been overhauled and readjusted in a series of Acts aimed at bringing economic certainty and security into the life of the farmer. Under the old system a farmer would not know until the end of the season, after he had made all his financial plans for the year, how much his wool, butter or meat had produced, with the result that he was in a continual state of suspense in which no attempt at planning was possible. Under the Guaranteed Price Scheme the Government announces at the beginning of the season the price at which it will buy produce which it later re-sells on the English market, taking the risk of rise or fall in prices itself. Of course the key to the success of the whole scheme is the amount of the guaranteed price, which is not calculated solely in accordance with market rates but is such as will give a reasonable return to the farmer and enable him to maintain a reasonable standard of life. In other words, the aim of the Guaranteed Price scheme is partly economic and partly social. So far it has been applied, experimentally, only to the dairy industry, with an encouraging measure of success. In combination with the arrangements for orderly and efficient marketing made by the Labour Government, this should put New Zealand's economic life on a much more safe and certain plane than before, for now the State is the guarantor of stability, instead of losses and gains being distributed individually and arbitrarily.

The New Zealand Tradition.—About half-way through Labour's second term of office New Zealand found itself engaged in a war that has now developed into a fight for life. Consequently many of the plans that the Government had made have had to be temporarily set aside. The problem of prosecuting and financing the war is now paramount, and Parliament and people are disinclined to bother with legislation or with any other activity that is not directly related to this end. Attention is, however, being directed towards the grave economic and social problems that New Zealand, like every other country, will face after the war. It is most improbable that the measures which produced prosperity in New Zealand in the past, even in recent years, will succeed in the shattered and transformed post-war world; but whatever Government is in power,

all the evidence of history shows that New Zealand will face her difficulties in a courageous and imaginative manner. There have been differences between Parties in the past, and there will be differences in the future, but they are largely differences as to detail. The vast majority of people in New Zealand are agreed on the ends to be attained—socially, politically and economically. There are often disputes, and violent disputes, as to the rate of social progress, but none as to the direction ; and when society, in the course of that progress, whether it is at the time slow or fast, encounters an obstacle, some means will be found of circumventing, surmounting or demolishing it, as is shown by the number of the Acts mentioned above which are now commonplace throughout the world, but which originated, under all kinds of Governments, in New Zealand. New Zealanders have no fear of novelty, and if they have a tradition, it is the tradition of experiment.

THE NEW ITALIAN CIVIL CODE.

[*Contributed by* PROFESSOR MARIO SARFATTI, *formerly of the University of Turin.*]

PART I. PERSONS.

A COMPLETE reform of the existing codes has long been needed in Italy, as they were in the main but hurried adaptations of the French originals. All the efforts of judges and writers failed to keep them in accord with changing social conditions, notwithstanding amending legislation.

Very many countries have of late drafted new codes or reformed their legislation, endeavouring to keep in line with the trend of modern juridical evolution. Unity of thought in all branches of science is now accepted throughout the civilized world, so that even jurisprudence has achieved a universal character and the progress obtained in one country is immediately followed by like progress in others.

Italy has long been working at the preparation of a body of codes founded on the old national traditions, while not neglecting the modern legislation of other countries: the first to appear were the Criminal Code and the Code of Criminal Procedure, which were the result of a successful compromise between the most diverse theories. These have been already reviewed in this *Journal*. Many drafts are now being completed of the Code of Commerce, the Code of Civil Procedure, the Civil Code. Of all these only the two first books of the Civil Code are in force at the moment.

General Considerations.—The first book of the Italian Civil Code came into force on July 1, 1939. A first draft of 1930 became definite in 1937 and, after some changes, was approved by the Parliamentary Committee in 1938 and enacted on December 12 of the same year. The text represents on the whole a noteworthy advance on that of 1865, but is unfortunately imbued with antiquated ideas: more particularly in regard to "Nationalism" and "Racial distinction"; the first is the pillar of the Fascist regime, the second has been recently added.

The preliminary chapter reveals its narrow "nationalistic tendency"; one gathers from s. 3 that juridical interpretation must no longer have regard to the "general principles of law" but must now obey the "general principles of the organization of the State," thus greatly restricting the range of ideas from which the interpreter can draw inspiration.

S. 6 no longer allows the alien to enjoy without limits the civil rights belonging to the citizen, but subjects these rights for him to conditions

and to the possibility of opposed provisions through special enactment. S. 7 lays down that as a general principle individual capacity is governed by national law, but, recalling the German Civil Code, provides that their national law is not to be applied to aliens when, in Italy, they enter an agreement for which the Italian citizen has the capacity, although their own law would not allow them such capacity. S. 20 rejects the " renvoi " ; it admits the application of foreign law, but not of any other law to which this one should refer.

The influence of the idea of " racial distinction " is apparent in the code at the very beginning: s. 1 of chap. i. limits juridical capacity according to the race to which a person belongs ; its fundamental principles in this regard are contained in a special decree of November 17, 1938, which creates the fantastic idea of " Aryanism "—regarded not as a language group but, contrary to preponderant scientific opinion, as a blood group—in order to give an ideal basis to the anti-Semites regulations now imposed upon the Italian citizen Jewish by race, which involves the limitation of his property and of his personal rights. Thus, we may note that the non-Aryan must not intermarry with persons of " Aryan " race (s. 89) ; that in case of conjugal separation (s. 153) or re-marriage (s. 340) he is refused custody of his own children if these are deemed " Aryan " as having an " Aryan " parent ; that he cannot be the guardian of an " Aryan " minor (s. 346) nor keep as his own (affiliazione) an " Aryan " child deserted by his parents whom he has brought up for some years (s. 402). These provisions, with others contained in special decrees and orders, exclude the Italian Jew from professional or cultural activity.

Racial considerations are indeed carried so far as to treat " nationality " of importance in case of marriage of an Italian citizen. Special conditions are imposed, and if the Italian happens to be a civil servant, it definitely forbids the foreign marriage (s. 89).

The idea of superiority of Italian " race " and " nationality " leads the Italian law to consider education conformable to " Fascist principles " as alone suitable for Italian children. As (ss. 145–404) set forth in the parliamentary report (p. 776) " an unlimited liberty in regard to education represents an individualistic idea now superseded ; in the Fascist regime the children belong not only to the Family but also to the State."

It is not the present intention to discuss the ideas of the governing regime. The aim is to review in their technical aspects the reforms adopted by the new Italian Civil Code, of which some are very good.

Arrangement and Summary.—The subject-matter is arranged in the same order as in the code of 1865 ; the first book covers " Persons." There is an introductory chapter concerning application of law in general, and then follow fourteen chapters dealing respectively with : Physical persons ; Juridical persons ; Domicile and residence ; Absence and presumed death ; Relationship by birth or marriage ; Marriage ;

Legitimation; Adoption; Paternal authority; Guardianship; Deserted children; Mental infirmity; Maintenance; Registration of births, marriages and deaths.

The provisions concerning the application of the law have been left almost unchanged; the most important alteration is the unification of the rules of International law for moveables and immoveables, to which s. 12 applies the "Lex loci"; s. 15 applies to contracts the national law of the parties if they belong to the same country, if not the "Lex loci contractus," if they have not arranged otherwise between themselves. Quasi-contracts and torts are governed by the law of the place where the event occurred which gave rise to the obligation. S. 19 adds a rule as to the "stateless person" (apolide) as to whom nothing was said in the earlier code; for him the law of his "Domicile" takes the place of "national law."

Persons.—Chapter I, on "Physical persons," is new; the code of 1865 hardly touched upon the subject. A complete set of rules has now been developed and extends to subjects hitherto elaborated only in the case-law, *e.g.* the disposal of one's own body (s. 5) and the protection of one's own likeness (s. 10).

Chapter II, on "Juridical persons," represents a new development compared with the code of 1865; it treats of public as well as private juridical persons, giving a complete book of rules on the subject, in accordance with the latest theories. Only one section (s. 11) is devoted to such public persons as are governed by public law, and four classes of these are mentioned. The State is not amongst them, it is considered as above them all. In ss. 12–40 rules are given for the private juridical persons on the three different forms of "Associazioni, Fondazioni, Comitati" (*i.e.* "Corporations, Trusts and administrative groups formed for a temporary purpose").

Chapter III is based on the traditional distinction between "Domicile" and "Residence," although the opposed tendency to unify these prevails in important modern legislative systems. "Domicile" is the place where a person has his own business centre, and "Residence" is the place where one usually lives (s. 41). In the rules applying this principle, s. 43 practically accepts a certain unification of the two: it considers the change of residence also to be implied change of domicile, if the person has not declared his intention to keep separate the one from the other.

Chapter IV introduces, for the first time into Italian law, the conception of "presumed death," which a decree of 1919 accepted only for people who had disappeared in war. S. 55 authorizes the court to presume such death after 10 years have elapsed since the absent person has been heard of; the presumption does not arise simply from the disappearance, as in English law, but it needs a judicial decision to give to it legal form.

Chapter V has limited (s. 75) the relationship of persons to the sixth

degree, so as to harmonize the general disposition with that allowing succession only within that limit.

Chapter VI reforms completely the law of marriage in accordance with the Concordat of 1929; recognizing as it now does for the first time the legal validity of religious marriage, the code establishes separate rules for marriage before a Catholic Priest, before Ministers of other religious bodies, and before the Registrar. Further motives for annulment are introduced to correspond to those of Canon law; s. 82 has for the same reason reduced the minimum age for marriage to 16 years in the case of males and to 14 in that of females, and in special cases respectively to 14 and 12, although the Government's Report (n. 71) admits that these limits are very low.

A new class of forbidden marriages is mentioned in s. 85, namely that between brother and sister-in-law, unless a special licence is secured. The aim of this provision according to the Government's Report (n. 100) is to " prevent marriage between persons who may have greatly offended by their former behaviour the feelings of the deceased."

S. 109 admits marriage by proxy not only for soldiers in time of war, as already provided in 1915, but also in special cases in which bride or bridegroom is resident abroad.

The grounds for legal separation admitted by the earlier code are reproduced in s. 149, save that there is a slight change in the character of the adultery by the husband which is effective as such. Between the view that simple adultery on the part of the man should suffice and that which would require that he should be notoriously keeping a mistress, the code steers a middle course and treats the man's adultery as an effective ground where it has led to cruelty towards the wife.

On the financial side the family ties are strengthened by a new form of marriage-settlement added to the old one of " dowry " : s. 165 allows a certain part of real property and bonds to be kept as " Family-goods," in a form similar to the trust, which Italian law has not hitherto recognized. This arrangement has the advantage that it operates until all the children of the family are of age, whilst dowry stops when marriage is dissolved.

Chapter VII is directed to the protection of illegitimate children by s. 250. Italian law for the first time contemplates the recognition of the adulterous offspring.

The new trend towards the protection of illegitimate children has led to an extension of the cases of judicial declaration of paternity (s. 267). Whilst as a rule inquiry into paternity was not allowed, this code now postulates a number of circumstances which give rise to its judicial declaration: (1) when the mother and the supposed father have been living as husband and wife since the child was conceived; (2) when paternity may be indirectly proved by a judgment or by a document written by the supposed father; (3) when the mother was a victim of rape or of carnal violence; (4) when the child has been publicly

reputed as that of the supposed father, who has brought him up as his own.

Seduction was excluded from the list as a circumstance on which a paternity cannot be based, and only damages may be asked against the person liable for such a tort. The extension of cases of " recognition " has augmented those of " legitimation " (sec. 282).

Chapter VIII gives new rules on adoption and, in opposition to the ideas of 1865, extends it to the illegitimate children of the person who adopts them, on condition that his paternity does not result from a private or judicial declaration (s. 291).

Adoption may always be withdrawn in case of misconduct on the part of the adopted person or of the adopter (ss. 304–5).

Chapter IX, although maintaining parental authority as in 1865, provides for supervision by a special judge (*giudice tutelare*), so that the State may always be in a position to control and even to suspend it in case of misconduct of the parents towards their children.

Chapter X simplifies the procedure in regard to guardianship of infants, so that no expense may be chargeable to them through the special judge who represents at once the family and the public authority (s. 342). This control, strictly exercised by the State, prevents the parents from appointing a guardian to their children ; they may only suggest a name for the approval of the judge.

Chapter XI places under the care of a Board of Guardians children deserted by the parents or of whom the parents are unknown (s. 400). This board has the power to give the child in custody to a person who wishes to bring him up and has means to do so, and the person selected may apply for perpetual custody (affiliazione) of the child in order to bring him up as his own (s. 402). This is a new device whereby family life is provided for many unhappy children deprived hitherto of any protection. It differs greatly from adoption, which is an addition to natural tie ; this new scheme aims at replacing the natural paternal tie by a new one based on charitable feelings ; it gives no right to succession and in certain circumstances may be brought to an end by judicial decree (s. 406).

Chapter XII treats of the insane and aims at protecting not only the afflicted person but also those who enter into agreements with him ; separate provisions dealing with lunatics (s. 409) and the feeble-minded (s. 410) and amongst these latter are reckoned persons addicted to alcohol and drugs. Only in special cases are those born blind and dumb also placed in this category, hitherto they have been as a rule deprived of juridical capacity.

Chapter XIII provides for the liability of relatives under the poor law and particularizes the relatives who, if possessed of sufficient means, are to be held responsible for the relief and maintenance of the person in need, extending the responsibility, with certain limitations, to brothers and sisters (s. 427).

Chapter XIV gives general rules for registration of births, marriages and deaths in accordance with judicial evidence, leaving all particulars to future enactment.

Conclusion.—This code follows the line of the one of 1865, but it constitutes a great improvement as it completes, so far as possible, the rules that up till now had to be sought in the judicial decisions. Since these do not in Italian law, nor indeed in any Continental system, possess the legal authority that precedents have in England, much uncertainty resulted.

Each chapter is the result of elaborate research by some of the most respected Italian jurists ; all parts have been discussed in committee and the code may be considered as the latest modern abridgment of Italian science of law.

Part II. Succession

General Rules.—The second part of the code, dealing with succession, came into force on April 21, 1940 ; a special decree relates it to the first part, so that the racial legislation which does not appear therein will equally apply as regards the limitation of the capacity of Jews. This is the only political touch ; otherwise the whole work is the result of the development of juridical science in general in the various countries, notwithstanding various references in the report to Fascist morals as the foundation of the reforms. This part of the code does not contain new principles but the subject has been thoroughly revised so as to give a complete body of rules on wills and intestacy, many of them in a much improved form.

Intestacy.—Intestacy occurs when a will is missing or is incomplete (s. 2) ; no pact is valid in regard to one's own succession (s. 3) ; acceptance is the foundation of succession (4), and it may be express or implied ; it may be limited *intra vires hereditarias* only by special declaration (*beneficio d'inventario*) (29), without which the heir will be liable *ultra vires* for all the obligations of the deceased. Creditors of the deceased may also ask for a *separatio bonorum* (57) in order to be paid by the heir from the deceased's money ; when debts are larger than assets, the heir may renounce the inheritance (64). A whole section is concerned with the part of inheritance assured by law (*legittima*) to certain relatives of the deceased (*legittimari*). On this subject discussions have been renewed, with opposite result, similar to those to which the English Inheritance (Family Provisions) Act, 1938, gave occasion. Some members of the Legislative Committee were against it, in order to leave to each individual complete liberty in regard to his own property, but the traditional Continental rule prevailed in order, it was said, to strengthen family ties. A special chapter specifies the deceased's relatives to whom such inheritance is assured : they are the legitimate or legitimated children as well as the adopted children, the parents, the illegitimate children and the surviving spouse (82).

The position of illegitimate children, as also that of the surviving spouse, has been greatly improved: if there is only one legitimate surviving child, he is entitled to a half of the whole inheritance. If the children are more, they are entitled to two-thirds of it (83), if there are no illegitimate children with whom they would share (87); in such case each of these is entitled to a half of what would be due to the legitimate, provided the inheritance of the legitimate may not be reduced to less than a third of the whole.

If there is a legitimate child and a surviving spouse, the child will be entitled to a third of the inheritance and the spouse of the life interest in a third. If there are more children, they will share with the spouse two-thirds of the inheritance; the surviving spouse is entitled to a life interest on a sum corresponding to a quarter of the inheritance (88). If there are also illegitimate children, they share with the legitimate in accordance with s. 87. If only parents are the heirs (84), they are entitled to a third of the inheritance; if with them also the spouse survived, she is entitled to a life interest in five-twelfths of the inheritance and the parents to the property of a quarter (90).

If there are parents and illegitimate children, they will share a half or two-thirds of the inheritance according to whether there is one illegitimate child or more of them (91). If there is also a surviving spouse, they share two-thirds of the inheritance, and in this the spouse is entitled to a life interest on a third and the parents to the property of a fifth or sixth according to whether there is one or more illegitimate child (92).

The illegitimate child, if recognised, is entitled to a third or half according to whether he is the only one or there are more of them (85). If other heirs are surviving with them, they will inherit less (see ss. 87, 88, 89, 91, 92).

The spouse is entitled to a life interest in two-thirds of the inheritance, or less if other heirs survive (see ss. 88, 89, 90, 92). If the deceased has disposed by his will of a sum exceeding that of which he could dispose, all bequests must be reduced in proportion (100). If none of the above-mentioned relatives survive, the next of kin, not beyond the sixth degree, will inherit (118). Special rules are given for the succession of different heirs (117).

Varying rules apply as regards illegitimate children according to whether they have been recognized or not: ss. 119–25 for the first case, s. 126 for the second.

The recognized illegitimate children surviving with the legitimate are entitled to a half of the sum due (*quota facti*) to each of the legitimate, provided these should not have altogether less than a third of the inheritance (120). If they survived with parents or the spouse of the deceased, they are entitled to two-thirds of the inheritance, and if with parents and the surviving spouse, they are entitled to the inheritance, minus a quarter due to the parents and a third to the spouse (121). If there are no legitimate children, nor parents nor spouse of the

deceased, the illegitimate children inherit the whole. If the illegitimate child died without leaving children or parents but the spouse only, he or she inherits the whole (122).

The illegitimate child who was not or could not be recognized is entitled to an allowance proportioned to the inheritance and to the number and categories of heirs ; this cannot be more than the life interest in the sum that would be due if he had been recognized (126).

The surviving spouse inheriting with the only child of the deceased is entitled to a life interest in a half of the inheritance, and if with more, to a third. This rule represents a great improvement for the case in which the spouse shares with surviving children : under the code of 1865 the spouse was entitled only to a life interest in a sum similar to the one due to each child, counting the spouse in the number of these in dividing the inheritance ; so in the case of three children, the inheritance was divided in four and the spouse was entitled to a life interest in a quarter of the inheritance, whilst now she may not have less than a third (127).

Inheriting with illegitimate children the spouse is entitled to a third in property ; and if with parents or brother or sister of the deceased, to a half (128) ; and if with relatives not beyond the fourth degree, to three-quarters (129).

If the marriage was annulled after the death of one of the spouses, the survivor will equally succeed, provided the deceased was not bound by other valid marriage (130).

Last of all comes the Crown (132). Its liability is limited to the amount of the inheritance.

Wills.—The general rules on wills are the same as under the code of 1865, recognizing the two forms, namely the holograph will and the notarial will (147), as also the special wills in case of a public disaster, on a ship or an aeroplane or on the battlefield (155).

Also as regards wills there is a great improvement in respect to the illegitimate children ; such as are recognized may freely inherit within the same limits as are fixed for the case of intestacy when legitimate children are also heirs (138).

For the illegitimate children who cannot be recognized, having been born in adultery or incest, the code substitutes a right of inheritance for the annuity allowed by the code of 1865. They have full capacity to inherit if there are no legitimate children nor a surviving spouse ; if legitimate children inherit with them, they are entitled to a half of what the less favoured of the legitimate inherit ; if with them and with the surviving spouse, they are entitled to a third of the inheritance (139).

There are also other rules which may be variously interpreted. Thus it is forbidden to proceed in court to show that the inheritance left to a person is intended for another (173) ; but this code adds that if the one has willingly transferred the inheritance to the other, he cannot claim to have it returned. Furthermore, particulars are given (175) as to bequests for the soul. These are valid if they consist of a fixed sum.

Conditions forbidding heirs to marry are void, and the code extends the prohibition to the condition of forbidding marriage to a surviving spouse.

As a general rule it is still forbidden to make a bequest subject to the condition for some one to keep the capital for another, but the new code makes an exception in regard to bequests made to a son or a brother or sister subject to the condition to keep the capital in order to pass it on to the legatee's own children; practically the same thing is accomplished by a bequest to children subject to the condition that they pay an annuity to their father (238).

Comprised in the same book on successions at Tit. V (316–56) are also found the rules as to gift, considered as a contract through which by liberality one party enriches the other by transferring to him a right or assuming an obligation towards him. Though a contract, it is very similar in its effects to a bequest, and as such its rules follow those on successions and precede those on contracts, as they are considered a link between the two.

LEGAL AID FOR THE POOR.

[*Contributed by* A. H. HASSARD-SHORT, Esq., *Secretary of the Law Society's Poor Persons Legal Aid Committee.*]

FOREWORD.

THE facilities for obtaining help in legal difficulties, both civil and criminal, and in litigation, which are provided for the poor are far greater than is ordinarily realized. The principle that it should be possible for anyone without means to obtain justice is almost universal. Safeguards are and must be imposed to prevent any abuse of the various systems of legal aid. The question then arises as to who is a person " without means." The definition of a person without means varies considerably. In England there is a statutory definition of a poor person applying for legal aid in the High Court. The poor person must not be in receipt of more than £4 per week or be possessed of more than £100 worth of assets. In Scotland a certificate of poverty is required. In Northern Ireland the means test is " not worth £25." In New South Wales a poor person must not be worth £50, subject to discretion under special circumstances; in South Australia, £100. In Western Australia and Victoria, the figure is £50; in Tasmania, £100.

In civil cases in the Union of South Africa an affidavit is required that the applicant is possessed of means not exceeding £10 in some Provinces, or £25 in other Provinces. In Canada there does not appear to be any Rule of Court analogous to the English Poor Persons Rules.

In Egypt free legal aid may be granted in respect of civil and criminal matters on condition that the applicant is in " a state of poverty."

In France included amongst the provisions the applicant must attach to his application a declaration that by reason of his lack of means he is unable to make good his legal rights.

In Germany legal aid is granted if the applicant cannot pay costs without encroaching upon the resources necessary for his

maintenance and the maintenance of his family. The conditions under which free legal aid is granted are that " the applicant must be a poor person," not complete destitution, but inability on the part of the applicant to pay the cost of the litigation.

In Switzerland the Federal Tribunal may grant a party free legal aid within its jurisdiction. The fees of the advocate appointed are paid by the chest of the Federal Tribunal.

In Sweden there is a legal aid system subsidized by the State, and also legal aid institutions.

In the United States of America there are at least forty-two associated legal aid societies.

Generally speaking, facilities for legal aid for the poor maintain in a large number of the countries of the world. Many of the most important are mentioned in the foreword to this paper. Before the war there was even a convention between Great Britain and Germany providing reciprocity. In some countries legal aid is State-provided and State-aided either by providing funds for administration only as in civil litigation in England and Wales or providing some payment for lawyers' fees. In other countries, and in the case of legal advice and county court cases in England, the movement is entirely of a voluntary nature.

England and Wales.—In England legal assistance may be dealt with in the following categories : (i) Legal aid in litigation in the High Court. (ii) Legal aid for " poor prisoners " to enable them to be defended in the criminal courts. (iii) Legal aid for appellants in the Court of Criminal Appeal. (iv) Legal aid in the county courts. (v) Legal aid in proceedings in magistrates' courts under the Summary Jurisdiction (Married Women) Act, 1895. (vi) Legal advice generally.

(i) Legal aid in the High Court and Court of Appeal. Rules of the Supreme Court (Poor Persons), 1914–38 (*Order* 16—*Rules* 22–31H). Under these rules any person obtaining a certificate shall be admitted to take or defend or be a party to any legal proceedings in the High Court of Justice (excepting bankruptcy proceedings and criminal causes or matters) as a poor person. The certificate is issued by the Law Society or by any Provincial Law Society, after inquiry by a committee appointed by the society and approved by the Lord Chancellor. The certificate must be signed by two members present at the inquiry.

A poor person is defined as one whose usual income does not

exceed £2 a week, or in special circumstances £4 a week, and is not worth a sum exceeding £50 (excluding wearing apparel, tools of trade and the subject-matter of the proceedings) or in special circumstances a sum not exceeding £100. There are ninety-five committees. The London committee sits once every week and the provincial committees as and when requisite. By far the greater number of applications are for divorce, but all classes of actions are dealt with, including such as personal injury cases, claims for damages for breach of promise of marriage, breach of contract, etc. There have already been a few cases under the Inheritance (Family Provision) Act, 1938.

Although the functions of the committee relate only to the granting or refusing of certificates, much assistance by way of advice and the settlement of claims is given to applicants in cases which cannot be dealt with by the granting of a certificate.

In the year 1939 no less than 14,438 applications for certificates, of which 5,760 were granted, came before the various committees for consideration. One case was settled for a sum of £5,000, and in another judgment was obtained for £4,831. The total of judgments and settlements in poor persons cases throughout the year amounted to no less than £39,000.

The following case may be mentioned as an example of help given in a case in which no certificate was granted. A personal injury case had been settled for a sum of £60, which at the time seemed quite a fair settlement. Subsequently the injured man developed paralysis. The insurance company was approached by the Poor Persons Committee, and notwithstanding the fact that it appeared doubtful if the paralysis was a direct result of the accident, a further payment of £50 was granted by the company. While the cheque was in the post the man died, but the insurance company very generously allowed the widow to have the £50.

The procedure is State-aided to the extent of a Treasury grant to cover the administration expenses, which amount to about £10,000 per annum. The cases are conducted by solicitors and counsel, who volunteer to do the work. The services of such solicitors and counsel are gratuitous.

A poor person does not have to pay any court fees or costs, but has to provide a small deposit to cover the actual disbursements incurred in the conduct of the case.

Three test cases under the Widows, Orphans and Old Age Pensions Act which were conducted under the Poor Persons Rules

were successful and resulted in many thousands of poor people becoming eligible for pension.

(ii) Legal aid for poor prisoners to enable them to be defended in the criminal courts.

The *Poor Prisoners Defence Act*, 1930, provides for legal aid for poor people charged with an offence in a Court of Summary Jurisdiction or committed for trial for an indictable offence.

In a Court of Summary Jurisdiction case, subject to certain conditions set out in the Act, a " legal aid certificate " may be granted whereupon the person charged is entitled to have a solicitor nominated to defend him. Provisions are made for the payment of the costs of his defence out of local funds. In the case of a person committed for trial for an indictable offence a " defence certificate " may be granted entitling the accused to free legal aid in the preparation and conduct of his defence at the trial and to have solicitor and counsel assigned to him for that purpose. The Act does not extend to Scotland or to Northern Ireland.

(iii) Legal aid for appellants in the Court of Criminal Appeal.

Under the *Criminal Appeal Act*, 1908, the single judge or full Court of Criminal Appeal may assign to an appellant a solicitor and counsel, or counsel only, in any appeal in which it appears desirable in the interests of justice and it also appears that the appellant has not sufficient means to enable him to obtain legal aid. The expenses incurred are paid out of the funds of the local authority, *i.e.* if the case is a London case they are paid out of the funds of the London County Council.

(iv)–(v) Legal aid in the county courts and Courts of Summary Jurisdiction. No statutory provision exists for legal aid for the poor in the county courts, but certain societies, such as the Bentham Committee, the Society of Our Lady of Good Counsel, both London committees, and certain other organizations in the Provinces assist poor litigants in the county courts and also in matrimonial disputes in Courts of Summary Jurisdiction.

(vi) *Legal Advice Generally.*—Legal advice generally is given by the committees appointed under the Poor Persons Rules (High Court), the societies mentioned in s. (iv) and legal advice centres throughout the country, some of which are organized by the legal profession itself and others by a local Council of Social Service, or Citizens' Advice Bureau, a Community Council, or a Borough Welfare Committee, or a Personal Service Society.

There are about fifty-five centres in London and about seventy

in the Provinces (see *Free Legal Advice in England and Wales*, J. Mervyn Jones, M.A., LL.B. Oxford, 1939). Legal aid is also provided by certain National Health Societies.

The legal section of the Welfare Branch of the Aldershot Command is doing valuable work in helping soldiers to solve financial and legal difficulties. Since November 1939 some five hundred cases have been dealt with. Advice has been given, and in all matters where legal work has been necessary it has been found possible to secure the services of a solicitor free of cost.

Scotland.—In Scotland there is a Poor's Roll, in accordance with the provisions of the Act of 1424, c. 45 (see *Bell's Dictionary and Digest of the Law of Scotland*, p. 812; *Green's Encyclopædia of Scots Law*, 2nd edition, vol. 9, pp. 346–57).

Applications for legal aid in criminal cases are dealt with by the Convener of Poor's Agents, c/o the Clerk of Justiciary, Edinburgh; civil cases by the Convener of Poor's Agents, c/o the Principal Clerk of Sessions, Edinburgh.

The Poor Man's Lawyer system exists in Glasgow and Edinburgh. There is a free legal dispensary in Glasgow, and in Edinburgh there is the Edinburgh Legal Dispensary.

Northern Ireland.—Belfast seems to be the only known centre. It was established in 1937. It has now been extended and is called the Belfast Council of Social Welfare (Inc.) Poor Man's Lawyer.

Australia: (a) *New South Wales.*—The granting of legal aid for the poor in civil proceedings is provided for by the provisions of the Poor Persons Legal Remedies Act No. 36, 1918, and Rules of the Supreme Court and District Courts. A list of solicitors willing to undertake cases is kept. Solicitors are allowed to charge a small sum for out-of-pocket expenses.

The Judge in Equity has power to remit any fee in any case where the party is unable, from poverty, to pay the same; but a person admitted to sue or defend *in forma pauperia* shall not be liable to any court fee. There is also the Poor Prisoners Defence Act No. 23 of 1907.

(b) *Queensland.*—In regard to criminal cases, there is the Poor Prisoners Defence Act of 1907, at p. 441, vol. 1, of the Queensland Statutes. The Act provides that any person committed for trial for an indictable offence may be granted legal aid if he is without means to provide for his own defence.

The Public Curator Act of 1915 gives power to the Governor in

Council to make regulations " with respect to the provisions of legal aid in any legal proceedings by or against poor persons, accused persons and others."

The Public Curator, through his official solicitor, also gives legal advice in civil matters to persons in poor circumstances on request from the Attorney-General, or when interviewed by such persons, if circumstances warrant it. The method of procedure by or against paupers is set out in the Rules of Court at p. 2434, vol. 3, of the Queensland Statutes.

(c) *South Australia.*—The procedure in South Australia is governed by the Poor Persons Legal Assistance Act, 1925, which deals with legal aid in criminal, civil and matrimonial cases. In criminal cases a judge, if he is satisfied that the person committed for trial is without adequate means, may order that the accused person be defended, and may assign solicitor and counsel to assist him, the costs of the defence to be paid by the sheriff in like manner as he pays the expenses of witnesses for the prosecution. The right of suing or defending *in forma pauperis* in the Supreme Court (Rules of Court, 1913) extends to any person not worth £100.

The right of prosecuting a suit *in forma pauperis* pursuant to the Matrimonial Causes Act, 1867, extends to anyone not worth £100. Whenever a judge makes an order admitting a person to sue or defend as a pauper in the Supreme Court, the sheriff may be ordered to pay to the solicitor nominated to assist the poor person such sum as the judge deems proper for (a) fees and expenses of witnesses ; (b) expenses of taking evidence on commission. The Act further provides that the Governor may appoint a practitioner of the Supreme Court to be the public solicitor under the Act. Upon the appointment of the public solicitor, whenever a judge makes an order permitting a person to sue or defend as a pauper the order shall direct that the case be assigned to the public solicitor, and the public solicitor shall undertake the conduct of the case. The same applies to the defence of an accused person. Every case under s. 13 of the Criminal Appeals Act, 1924, shall be assigned to the public solicitor.

(d) *Western Australia.*—Legal assistance for poor persons is granted under the Poor Persons Legal Assistance Act, 1928, of Western Australia. A poor person is not liable to pay any court fees. Solicitors and counsel may be assigned to assist the poor person. Costs ordered to be paid to a poor person shall be taxed unless otherwise directed by the court or a judge. The system is

somewhat similar to that prevailing in England and Wales. The means test is £50.

(e) *Victoria.*—The Poor Persons Legal Assistance Act, 1928, described as " An Act to consolidate the Law relating to the provision of Legal Assistance to Poor Persons," is comprised in two parts : Part (1), Poor Prisoners Defence, ss. 3, 4 ; Part (2), Poor Persons Legal Assistance, ss. 5–10. Part (1) : Any person committed for trial for an indictable offence may apply for legal aid for his defence. If the applicant is without adequate means to provide legal aid for himself, arrangements may be made for the defence of the accused person and the payment of the expenses of all material witnesses. Part (2) : Legal aid in civil proceedings in the Supreme Court is granted pursuant to Rules of Court (Order XVI, Rules 22–31 A). These rules are very similar to the English Rules, but a poor person must not be worth more than £50.

(f) *Tasmania.*—The Poor Persons procedure in Tasmania is governed by the Supreme Court Civil Procedure Act, 1932 (No. 58), Public General Acts of Tasmania, Vol. 2. A poor person is defined as a person not worth a sum exceeding £50 excluding wearing apparel, household furniture and equipment in use in his or her home up to the value of £40, or in special circumstances not worth a sum exceeding £100 including the above items. The income limit is £3 a week or in special circumstances £4 a week. In other respects the procedure is framed upon the basis of the English Poor Persons Rules. The poor person may be called upon to make a deposit for the expenses of the case. Costs ordered to be paid to a poor person must be taxed.

Canada.—There does not appear to be any Rule of Court in Canada analogous to the English Poor Persons Rules whereby persons with small incomes can obtain the services of a solicitor in Canada free of cost. Rule 29 of the rules relating to the conduct of matrimonial causes in the Supreme Court of Ontario provides that " An Order may be made by a judge for the payment of a wife's interim disbursements by her husband." Such disbursements are only such taxable disbursements as are covered by the rules. Beyond this, the rules make no provision for a wife petitioner to institute divorce proceedings as a poor person.

Union of South Africa.—A " Legal Aid Bureau " was inaugurated in Johannesburg during 1937, whereby the Johannesburg Society of Advocates and the Incorporated Law Society of the Transvaal formed panels of advocates and attorneys who are prepared to

undertake the defence of certain types of accused persons who are unable to pay for their own defence.

The object of the scheme is to render legal aid in cases before the courts in which the prosecutor or the presiding judicial officer is of opinion that an accused person, who is unable to meet the cost of engaging an advocate or an attorney to conduct the case on his behalf, should be professionally represented.

Advocates and attorneys who undertake cases under this system are paid specially reduced fees by the bureau, which derives its funds partly by way of a grant from the Institute of Race Relations and partly from private donations. In some instances accused persons themselves, or their relatives and friends, are able to pay these reduced fees and thus secure professional aid, which would not have been possible had the usual fees been charged.

As regards the non-criminal side, the bureau assists poor persons of every race with elementary advice. Very often they are shown where they can get help without undue expenditure of money.

The bureau is, however, still in an experimental stage, but has thus far proved a very real benefit to poor persons, and is being extended to other centres in the Union.

India.—No very full information is available as to the practice in India in regard to Poor Persons Legal Aid. There appear to be arrangements in force throughout India for the provision at Government expense of counsel to defend at trials by sessions courts (corresponding approximately to assizes in England) persons charged with offences punishable with death who are unable to afford to brief counsel. Arrangements appear to be confined to death penalty cases.

There is a non-official Legal Aid Society in Bombay and also in Calcutta. The Annual Report of the Bombay Legal Aid Society for the year 1939 discloses that 107 formal applications for legal assistance (as against 63 in the year 1938) were dealt with by the society during the year, in addition to numerous applications for advice in which advice was given. The matters dealt with by the society related (*inter alia*) to obtaining instalments for money decrees, accounts of small partnerships, divorce, maintenance, custody of minor children, disputes between client and his legal adviser, recovery of wages and disability allowance, and damages for injuries due to negligence. Several typical cases are quoted.[1]

[1] *The Bombay Law Journal*, vol. xviii, No. 4, April 1940.

United States of America.—*National Association of Legal Aid Organizations*.—The Report of the Joint Committee for the Study of Legal Aid of the Association of the Bar of the City of New York and the Welfare Council of New York City (1925) contains much valuable and interesting information. The following definition is set out: "Legal aid means legal assistance competently furnished with or without a moderate charge to all deserving clients unable to pay the usual fees of private attorneys therefor, and thus likely fail to secure justice, either by arbitration, conciliation or action or proceeding in whatever form, civil or criminal, whether practicable, whether the proceedings be on behalf of or against the person seeking aid; also to give advice and assistance where a right is to be secured or defined, though no litigation is necessary." Further, it involves not only the idea of individual justice but the promotion of social justice generally through measures for the protection of the poor through legislation, carrying through test cases, co-operation with agencies, governmental and private, or otherwise, since it can be understood that legal aid agencies may be and often are hindered in the accomplishment of their supreme aims by backward legislation, unsound rulings, antiquated procedure and defective administration of the law.

The accomplishment of the aims of individual justice and of social justice gives the legal aid agency a distinct place in the general welfare field since the fundamental basis of the work is the attempt to solve human problems (John S. Bradway, Use of Legal Aid Recourses, 1927, *Nat. Conf. of Social Work Proceedings*, 1927, p. 630).

The means of furnishing legal aid are: (1) Organised legal aid whether or not rendered by organizations exclusively devoted to that purpose. (2) Unorganized legal aid from such sources as large employers, labour or social groups, or individual attorneys, or the press. (3) Public Agencies. "The Legal Aid Society" is the oldest and largest general legal aid agency in the country. It was organized in the year 1876. It is now said to deal with some 28,000 cases a year. Legal aid in general does not receive any financial assistance from State or municipal governments. Public bureaux are supported by public funds. The work has had to be financed by appeals to the Bar and the public.

So far as the defence of persons accused in criminal courts is concerned, there appears to be a general term "public defender." These are "public defenders" created by statute and supported by the county treasury. When a private attorney offered his services

to poor persons accused of crime, the press referred to him as " public defender." Defence is also provided by private legal aid organizations. There are at least forty-two associated legal aid societies.

Sweden.—In the year 1872 the administration of the town of Goteborg appointed two lawyers to assist the poor, both in and out of court, for a small fee, chiefly in connexion with the procedure of conciliation. This example was subsequently followed by other towns.

A legal aid system subsidized by the State came into force in the year 1920. Free legal aid can be granted by all persons not in a position to pay for legal advice or who would be " deprived of the resources necessary for the maintenance of themselves and their families." No particular income limit is fixed, but the income and means of the person shall be considered in relation to the cost of the proceedings.

The procedure applies to both civil and criminal cases. Certain expenses are paid by the Treasury and the poor person is exempted from the payment of stamp duty on summonses. The law only covers legal aid before the courts.

Legal aid institutions have been set up. The part played by the State is restricted to affording them financial assistance.

Poor persons may apply to the institutions for legal aid in matters other than those directly connected with court proceedings.

Egypt.—Legal aid for the poor in Egypt is governed by *Règlement Général Judiciaire des Tribunaux Mixtes*, July 9, 1939 ; *Gazette des Tribunaux Mixtes d'Egypte*, XXIX (1938–9), p. 268. *Title XIII : De l'assistance des pauvres.* This provides that it shall be the honorary duty of advocates to act for the poor. Commissions are set up for each court, including the Court of Appeal. The commissions are composed of : (1) One judge of the tribunal ; (2) a member of the Ministère Public ; (3) a batonnier or a member of the Council of Advocates acting as his delegate. The law grants free legal aid in all penal or civil matters. Such aid includes : (1) Free defence and representation ; (2) free court fees ; (3) all incidental expenses —expert evidence, journeys made by officials ; (4) free execution of judgments ; (5) free advertisements where necessary. Charitable bodies whose aim is the promotion of the welfare or education of the poor are allowed to benefit by the law as " poor persons."

The conditions on which a poor person is allowed to proceed are : (1) Poverty ; (2) the probability of a successful issue. In penal matters free aid is governed by Arts. 146, 147 and 148 of the

Code d'Instruction Communelle. By poverty is meant a state in which the claimant is unable to support the costs of the proceedings —not complete destitution. (This is the Italian test also.) Applications are heard by the Commission of the court in which it is desired to commence proceedings. In case the application is rejected the applicant may appeal to the Commission attached to the Court of Appeal. Where costs are awarded against the other side they go to the Treasury.

France.—Prior to the German occupation, legal aid for poor persons was governed by the law of January 1851, as amended by the laws of July 1901 and December 1907. A poor person had to submit an application to a local official, together with a certificate to the effect that he was not taxed and a declaration containing a detailed account of his means of livelihood. The application was submitted to a Legal Aid Bureau. The bureau was the authority to grant or refuse legal aid. The procedure differs from that in England on one important point. The bureau must, if legal aid is refused, state the reasons for refusal (law of July 1901, Art. 12, paragraph 1 as amended by the law of December 1907). In England the Poor Persons Committees are not required to give reasons for their decisions, whether an application is granted or refused. In France legal aid could not be granted to foreigners unless reciprocity is provided for by a diplomatic convention, or in a case where a foreigner has been permitted by decree to establish his domicile in France. France was also a signatory to the Hague Convention of July 17, 1905.

In addition to the authorities mentioned in the text, reference may be made to the annual reports of the National Association of Legal Aid Organizations of the United States, and as a foundation for the study of the subject there is a useful report entitled *Justice and the Poor*, published by the Carnegie Foundation in 1919. The Law Society has had occasion to deal with the subject from time to time, and in particular may be noted papers read at the provincial meetings in 1928, 1931, 1935 and 1938.

THE RIGHT OF REPLY TO LIBELS IN THE PRESS.[1]

[*Contributed by* DR. IGNACE ROTHENBERG.]

A NEWSPAPER which attacks a person may be held responsible. But before the court has given its decision and the newspaper readers have come to know about it, many months may pass. Until then the readers will remain under the impression given by the offending article, and if a paper only states untrue facts about a person without attacking him so that he cannot sue, there would be no possibility whatever for the person concerned to enlighten the readers.

Consequently the press laws of most countries give the right of an immediate reply to be published in the paper.[2] A person or institution attacked by a newspaper, or one who is the object of an incorrect report, has the right to a prompt rectification or explanation. Thus he is able to use the same weapon aimed at him, and is therefore in no worse position than the newspaper in the struggle for the judgment of the public.

The first law of this kind was introduced in France more than a century ago. The need for a right of reply had been felt in the years of the French Revolution. The newspapers made great use of the new freedom of the press and indulged in violent and offensive language. Complicated proceedings were the sole defence ; their result came seldom to the knowledge of the readers. Therefore in 1796 the deputy Dulaure brought a motion in the Council of the Five Hundred to impose upon newspapers the duty of accepting a reply to articles injurious to the reputation of a citizen. But the penalties proposed by Dulaure against papers which would not publish such replies were regarded as too severe by the majority of the deputies, who rejected the Bill. It was not until

[1] The article is based on the regulations on the right of reply in various countries and on my own practical experience. The press laws concerned issued before 1926 are contained chiefly in the collection *The Press Laws of Foreign Countries*, edited by Montague Shearman and O. T. Rayner (London, 1926, Stationery Office). Regulations concerning the right of reply, not quoted in this book, *i.e.* of Luxemburg, Switzerland, Portugal, Spain, were procured otherwise. Among the press laws promulgated after 1926, the regulations of Czechoslovakia in 1933 and of Austria in 1934 are particularly important, as they brought about significant reforms. The texts were at my disposal. With regard to French law and its practice, attention must be drawn to the excellent book *Le Droit de réponse*, by André Perraud-Charmantier (Paris, 1930). The date of the press laws quoted here is added for the reason that changes of the provisions are not infrequent, and as there may be later amendments which have not come to my notice.

[2] Among the countries without special regulations concerning a right of reply Great Britain and U.S.A. are the most outstanding.

1822 that a right of reply was established. Though altered in 1881 and 1919, this law is still valid in France. It is based on the principle that any person mentioned in a newspaper or in a periodical, either by name or indirectly, has a right of reply limited only as to extent, but not as to arguments. Slowly this right, after undergoing various changes, influenced the legislation of most countries of Western and Southern Europe, and also of overseas. The laws established in some countries of the later German Reich in the middle of the nineteenth century, and later on in the Austro-Hungarian Monarchy, were quite different. They are still valid in Germany, Poland, Czechoslovakia, Austria, Hungary, and Yugoslavia. The press laws of four Swiss cantons (Bern, des Grisons, Schaffhausen and Vaud) also belong to this group.

According to these laws, the newspaper is only bound to publish a reply limited to the rectification of facts. This " rectification "—in German " Berichtigung "—is opposed to the free polemics known in France as " réponse." The difference between them is great. In France the injured person is entitled to lay open his point of view, even if the contentions of the paper do not contain facts, but opinions or conclusions. On the other hand, in the Central European countries the reply must be required by a genuine interest in a correction of untrue statements. The press laws belonging to this group show, more or less distinctly, that the rectification is a defence against a wrong, while the French group recognize in the reply the right to an explanation.

In the present century the institution of reply restricted to a correction of facts was adopted by Norway (1902), Finland (1919) and Latvia (1924). Also the press laws of Japan (1909) and of Guatemala (1894) show a greater affinity to the provisions of the Central European than to those of the French group. But between the two groups there are graduations. This appears in the various names given to this right. Besides " reply " and " rectification," we find the following expressions in the press laws: notice, elucidation, explanation, declaration, answer, explanatory statement, correction, refutation, defence, denial, contradiction, réplique.

These expressions go far to explain the nature of the insertion. A correction must be briefer than an explanation, a refutation will not be as detailed as a reply or a defence. It is obvious that the regulations concerning the right of reply must differ in various countries. This is not the place to examine how far political circumstances and the extent of political freedom, the tone of the newspapers and national character have co-operated to form the structure of the right of reply. It is certainly not by chance that the vivid Latin nations decided in favour of the free reply, while Germany and some adjacent countries adopted the rectification of facts.[1]

[1] In this article the expression " reply " is used chiefly in its general meaning, *i.e.* comprising both reply and rectification. Only if it is opposed to rectification, it means the reply according to the laws of the French group.

Length of the Reply.—According to most press laws, the reply may be longer than the corresponding article. The person mentioned is allowed to say more than the aggressor. But this idea is not always carried out in practice. On the one hand, the laws endeavour to give injured persons the opportunity to explain their point of view with the necessary minuteness of detail ; on the other hand, newspapers must be protected from replies which are intentionally prolix. The result is a compromise. Most press laws fix a certain length for the replies, and any excess must be paid for. Certainly this leads to brevity ; nevertheless, if the length of the reply exceeds the limit fixed by the law, the loss to the paper can be diminished by compensation.

As for the press laws of the French group, the limitation of the reply is understandable, as the reply may contain reflections or conclusions, and therefore become very long. The most frequent regulation allows a reply twice the length of the article ; if it occupies more space, the surplus is charged for at advertisement rates. We find such regulations in the press laws of Italy, Belgium, Luxemburg, Portugal, Rumania, Greece, Syria, Colombia and Haiti. French law also knew these regulations formerly, but by an Act of 1919 they were altered, because abuses were frequent. It often happened that payment was made for a reply of extraordinary length to the embarrassment of the newspapers. Therefore the French law of 1919 states that the reply must be free of charge, and the option of exceeding the limit by way of offering payment for the excess no longer exists. The reply must not exceed the length of the article exclusive of the forms of courtesy and request, and also of the signature. At any rate, the reply may comprise fifty lines, even if the article is shorter, and not more than two hundred lines, even if the article is longer. These regulations apply also to " répliques," *i.e.* replies to a comment which a newspaper coupled with a reply.

A very unfriendly attitude towards the newspapers is shown by the Egyptian press law (1881), which begins with the statement that the press is only tolerated. It admits a reply even five times as long as the article. The laws of other countries advocate that replies should be brief. According to the Greek (1914) and Japanese laws (1909) the reply must be only as long as the article ; the excess must be paid for.

The press laws of the Central European group regulate the matter differently. As the rectification according to these laws is to be restricted to the correction of facts, it cannot be longer than is necessary to correct facts asserted by the paper. If it is too long, it is not a rectification according to the law, and the newspaper may reject it. Therefore the Austrian law (1922) does not limit the length of the rectification, and, of course, does not impose any charge for it. The Hungarian law (1914), restricting the rectification to a statement of facts or a simple denial of assertions, adopts a similar view. The rectification must not be longer than the article, but it is provided that " the facts necessary for rectification can be stated in a communication of greater length." In short, the

rectification should be as short as possible and as long as necessary. As in Austria, it must be inserted gratuitously.

The German attitude is quite different : the rectification may not be longer than the article which it corrects, apparently on the ground that the same space must suffice for the correction of facts as was needed for the false statement. If, for instance, a newspaper asserts that Mr. Smith is about to resign as chairman of the X Bank, the denial of his resignation must not be longer. If it exceeds the length, " the usual costs for the insertion of advertisements " must be paid for each line in excess.

In Norway (1902) and in Finland (1919) also, where only corrections of facts are allowed, the regulations are similar. The Norwegian law permits only fifty lines free of cost ; if the reply occupies more space, the usual charge for advertisements may be made for the excess. In Finland an " equal amount of space " is granted free of cost ; any additional space must be paid for. No charge, however, is to be made for rectifications not exceeding fifty lines. A liberal tendency is shown by the press law of Yugoslavia (1904 and 1921), which defines the reply as a " correction of inexact facts or allegations." This may be " of a great length, and consist of one whole column of the paper or of an article twice the length of the article which gave rise to it." In Czechoslovakia a new press law (1933) followed the French example, and fixed a limit for the rectification, which cannot be exceeded by an offer to pay for it. According to this law, the rectification is to be published free of cost, if it occupies twice as much space as the article ; the excess must be paid for, but the rectification may never exceed treble the length of the article.

A singular type of rectification exists in Denmark (1851). If a person considers himself personally attacked in a periodical publication, or wishes to correct statements therein concerning himself, he may demand the insertion, without payment, of a notice of the institution of proceedings in consequence of the attack, and of the result of the proceedings, or he may demand the insertion of a reference to a correction in another publication.

As a matter of interest it may be mentioned that the press law of Guatemala (1894) expressly demands that the reply must be delivered " in writing." In the law of Panama (1916) the length of the correction is limited as follows : the correction must not " occupy more space than is deemed necessary in the opinion of the Mayor of the district."

As for the reply to a series of articles which are published in the same newspaper and concerning the same person, this question is only dealt with in the press law of the canton of Vaud (1898). According to it, a reply may be made to series of articles by means of one article only, at most twice the length of the longest article of the series. In other countries a series of articles is regarded as a single article, with the result that a reply may amount to twice the combined length of the articles. This solution has met with widespread criticism.

A layman will hardly be able to calculate how much space of a news-

paper a written text will occupy. For this reason the press laws of Belgium, Luxemburg and Portugal relieve him of the trouble of calculation, and state : The reply should not exceed one thousand written letters or twice the space occupied by the article.

Payment for the Excess.—The question of payment, if the reply exceeds a certain limit, represented a difficult task for legislators. The expense should prevent too much valuable space being taken up ; therefore it should not be too low. The writer of the reply will be compelled to be brief. But, on the other hand, he should not be deterred by a high charge from saying what is necessary ; therefore the insertion should not be too expensive.

Accordingly the press laws do not leave it to the newspaper and the writer of the reply to fix the cost of the insertion, but decide it themselves. In a few countries they are fixed at the rate of the usual costs for the insertion of advertisements, *e.g.* in Germany, Italy and Norway. Usually the same charges are demanded as for judicial announcements ; in Czechoslovakia and Portugal the average charge for advertisements in the newspaper concerned is the basis, but it may not be higher than the tariff for official publications in the official gazette of the country. The Finnish law demands a calculation " at the lowest advertisement rate." In Haiti a price of 50 centimes a line is fixed by the law. It is obviously the intention of the law to keep the costs of the reply at a low level.

There are only two regulations regarding the mode of payment. The Portuguese law (1926) states that payment must be made within forty-eight hours of the insertion, the Czechoslovakian law (1933) demands payment in advance. But this does not mean that payment in advance may not be asked for in other countries. If this mode of payment is usual, the newspaper is entitled to reject the reply in case payment is not made at the same time. At any rate, payment in advance does not encourage long replies. In France before 1919, when a reply might be twice as long as the article, and when the excess was charged according to the tariff for judicial announcements, it was said that these low costs and payment after publication, at no fixed time, were responsible for the extraordinary length of the replies in the papers. This also led to replies being sometimes sent by insolvent persons, who never paid for them at all. For this reason the French regulations were altered.

In this connexion it may be pointed out that some press laws apportion the length of the reply according to lines or fix the costs of the insertion according to the price of a line. This may cause some confusion. A regulation of this type assumes that all newspapers of the country concerned have and also will have in the future uniform columns of the same breadth. If this is not so, newspapers which have wider columns are at a disadvantage. As there is no uniformity in the size of newspapers, the line is not an apt measure. In England also the newspaper columns differ in breadth.

Prescription.—It is in keeping with the character of the reply as a reparation, which is the more effective the quicker it takes place, that the

press laws of some countries fix a relatively short prescription of the right to reply. The contents of a newspaper are soon forgotten ; if months elapse before a reply appears, not many readers will remember the libel. Therefore, the press laws of Hungary, Yugoslavia, Greece and of the canton Vaud state that the right to publish a reply expires after a month ; but if the author of the reply is abroad when the article is published, prescription is extended to three months according to Greek law. In Austria and Czechoslovakia prescription extends to two months, in Portugal to six months, in Norway to one year.

The French right of reply was made subject to a prescription of one year in 1919. Until then it was held that, according to Art. 2262 of the Code Civil, the prescription of thirty years must apply. But the possibility of publishing a reply after more than twenty-nine years, when the content of the article which caused the reply has been forgotten, induced the French legislator to fix a prescription of one year. This was done in connexion with the reforms in 1919, following proposals to establish a prescription of three and then six months.

Some press laws do not provide for prescription, as, for instance, the German law. Since the writer of the reply must be " concerned," and this " concern " ceases, of course, after a time, a kind of prescription takes place automatically.

Position and Lettering of the Reply.—The reply should be published in such a manner as to enable all those who have read the article to find the reply. Casual readers who occasionally read the paper containing an attack against a certain person, and then perhaps do not see it for a long time with the result that the reply escapes them, must, of course, be ignored. In order to draw the attention of the regular reader to the reply, most press laws, particularly of France and of other countries based on the French law, demand that the reply should be printed " in the same place " and " in the same type " as the original article. If this regulation were interpreted literally, the reply would have to be placed on the same page, in the same column and also at the same height. That is sometimes hardly practicable for technical reasons. A newspaper cannot always arrange for articles to end just where the reply should be put. Also it is not always in the interest of the reply to place it just in the same position as the article. The same pages do not contain always articles on the same subject ; besides, a newspaper does not always contain the same number of pages. It may happen that a certain page contains to-day economic reports and two days later reviews of films and books. If a reply to an economic report is demanded and it appears, according to the wording of the law, on the same page on the day when book-lovers and film-friends turn their attention to this page, it is likely that of those interested in economic reports only conscientious readers will find the reply.

Proceedings have been instituted repeatedly because replies were not published in the same place as the original article in accordance with

the law. But the courts have referred to the intention and not to the wording of the law, especially if the mischievous motive of the action was obvious. They have examined whether it will come to the notice to the circle of readers for whom the reply is meant. As a rule the expression " place " is not interpreted as meaning the same position in the paper, but the corresponding section.

In consequence other press laws demand the publication in the same " part " of the paper, or in the same section, *e.g.* in Germany, Austria, Czechoslovakia and Latvia. The page is irrelevant. The Yugoslavian law paraphrases this thought and says that the reply is to be printed " in the part of the paper corresponding to that occupied by the relevant article or statement."

But not all papers divide their contents into various sections. The Finnish law is satisfied with the printing of replies " in the text," *i.e.* it must not be put in a page filled with advertisements. In Guatemala " a similar page and column " is demanded, in Japan the position is not mentioned. In Tsarist Russia position in the same section and the use of the same types were only granted if it was expressly demanded.

While the regulations concerning the position of replies admit of different interpretations, the direction contained in most press laws that the reply must be printed in the same type has but one meaning : The importance of the reply should not be diminished by the use of a smaller print. Moreover, the Yugoslavian and Greek laws are indulgent on this point and merely demand a " similar type."

The press law of Italy does not contain any rules regarding the manner of printing and placing the reply, nor do the courts demand publication in the same place and in the same type. But the duty of the newspaper is not considered as fulfilled if the publication is particularly inconspicuous.

Delivery of the Reply.—Press laws do not usually contain special regulations as to the manner in which replies should be delivered to newspapers. It is usual not to address them to the newspaper but to the person legally responsible for the insertion of the reply. In France, as in Belgium, Luxemburg, Hungary, Brazil and in other countries, it is the editor (*le gérant*) ; in Germany, Austria, Czechoslovakia and Yugoslavia it is the " responsible editor " (*der verantwortliche Redakteur*) ; in Italy the editor for private and the manager for official replies ; in Bulgaria, Syria, Colombia and other countries it is the manager ; in Finland the editor-in-chief ; in Greece until 1914 the publisher, and since then the editor proprietor, or director.

The most effective way is delivery by registered letter, because in case of dispute the sender can show the postal receipt. Cautious people will use an advice of delivery (*avis de réception*). If no time must be lost, the reply will be delivered by a messenger, and a receipt must be given in acknowledgment. The Portuguese law of 1926 (Art. 53, § 6) deals expressly with delivery by way of registered letter. Yugoslavian law

declares that it is permissible to send the reply by post ; apparently this statement was found necessary because there was once a spirited discussion about this question, when a French court had declared that the sending of a reply by a registered letter was not sufficient evidence of a reliable delivery. The same law also indicates another way for sending replies : It is permitted to deliver the reply through the intermediary of the Court of First Instance of the district where the paper appears ; the court has to forward the reply to the paper on the same day. Thus the reply is under the protection of the court from the outset, and comes into the possession of the newspaper in the manner of an official document.

Austrian law provides a method which excludes every doubt that the reply has reached its destination. Upon demand, the responsible editor is bound to give the sender of the reply a confirmation that publication of a reply was requested.

Other facilities in favour of the persons or institutions requesting the acceptance of a reply are provided by Czechoslovakian law. According to it, the reply is to be delivered to the responsible editor, but it provides for the contingency of this being impossible. It may happen sometimes that the responsible editor avoids the acceptance by making himself undiscoverable, or that he refuses to receive the reply. The law provides in this case that " if it is impossible to deliver the reply to the responsible editor, or if he refuses to accept it, then it must be presumed that the publication was refused. In addition, the law states that it is sufficient if the reply is delivered to the editor or to the printer.

Reasons for Rejection.—Not every press law enumerates the reasons which entitle a paper to reject a reply. But, according to the law as interpreted by the courts, it can be said that a paper is entitled to refuse a reply if the publication would be punishable or injurious to third parties owing to its offensive content or for other reasons. In the press law of Norway this rule is expressed in these words : " . . . provided the contradiction contains nothing of a penal nature and does not confer a right of contradiction upon any third party." Some laws, *e.g.* of Tsarist Russia, Latvia, Finland and Yugoslavia, demand that the reply must be signed by the persons concerned ; in Japan the reply can be rejected if the name and address of the signatory are not clear. The press laws of Germany, Austria and Hungary make it a condition that the reply must be written in the language of the country or of the paper. This regulation owes its origin to a time of violent national strife. In the countries mentioned above there were, and still are, districts with a population belonging to two or more nations. These saw their national rights menaced and demanded a legal safeguard, even where they did not seem to be in danger. In Czechoslovakia, which has a large German minority, replies can also be sent in a language other than that of the article to which the exception is taken. It is not to be considered a change if the reply is translated into the language of the article, but it must be made clear that it is a translation.

In Poland, where some national minorities (Germans, Czechoslovakians, Ukrainians, White-Russians, Lithuanians, Jews) had papers in their language, a provision (1928 and 1938) orders that rectifications sent to these papers or periodicals may be drawn up in the Polish language. The editor is bound to translate the rectification into the language of his paper, without charging the writer.

Where prescription is provided, newspapers are entitled to refuse a reply upon expiration of the time limit. The length of a reply which exceeds the limit allowed by the law may also furnish a just cause for refusing acceptance.

Besides these external reasons for refusing a reply, there are various internal deficiencies, not always recognizable at first sight. The tone of the reply must be considered. Is a polemical note allowed? If according to the law rectification serves merely to correct facts, there is no occasion for polemics; a quiet, sober tone is an absolute requirement. Every word which exceeds the statement that the allegation of the paper is untrue would deprive the rectification of its character and would justify rejection. But in many countries replies are not restricted to a correction of facts, and as they express opinions and judgments in opposition to those stated in the paper, they become polemical. The courts concede to the replies a tone proportionate to the violence of the attack by the paper. The object of the attack may not only use the same weapon, but should also be allowed to retaliate with equal strength.

Press laws abstain from special regulations on this matter. But the Yugoslavian law demands that the reply should be polite, and the law of Latvia lays down that it must not be of a polemical character. According to the Czechoslovakian press law, the newspaper is entitled to reject the rectification if its content is "grossly indecent." These three regulations are capable of various interpretations.

The reply may be refused at once, of course, if the sender is not entitled to write it, *i.e.* if he is not named or designated in the article as required by the law, and also if the reply does not refer to the article. In Austria, according to the new regulation of 1934, a rectification need not be published if the paper was legally bound to print the notice complained of, or if it can prove the correctness of its communication by a decision or a decree of an Austrian authority.[1]

The writer of the reply learns from the paper within a limit of one or two days, as a rule, whether a reply is refused or accepted. Only the press law of the canton of Vaud orders that the editor must inform the writer of the reply if he refuses to print the rectification.

Comment on the Reply.—Newspapers object to replies, as a rule, because they involve the admission of some error or misstatement.

[1] The meaning of this provision will be discussed later on in another connexion. Besides, a forerunner of this regulation is contained in the former press law of Austro-Hungary (1862), which orders that facts published by the authorities are not to be corrected.

Accuracy of his report is the highest aim and the greatest pride of the journalist. Therefore newspapers are inclined to ignore errors and so avoid rectification. The average reader does not perceive the error and the paper is not called to account. It is quite different if a false item of news concerns the interests of a person or an undertaking or a corporation who refer to the law and ask for a rectification. In such case the real facts are usually published at once. But it occurs not infrequently that the newspaper abides by its statement. It prints the reply because it is compelled by law to do so, but allows a comment to precede or follow. This is a frequent feature in countries where newspapers use a polemical tone, or where vivid political struggles are carried on. The French and the Czechoslovakian laws expressly provide the possibility of a comment: the first-mentioned orders that the "répliques" to comments of the newspaper should be subjected to the same regulations as replies; the latter demands that a comment to a reply should be distinctly recognizable as a remark of the paper. This provision shows that it is not commonly used. But, as a rule, the separation between reply and comment is announced by a change of type, or by the insertion of the usual signs; often the reply is given in quotation-marks.

The Hungarian press law (1914) forbids a comment in the same number, but the editor is entitled to state briefly whether or not he maintains the statement to which the rectification refers. This regulation aims at influencing the readers by the reply and wishes to avoid a spirited comment which might impair the impression. But as a consequence of postponing the comment until the next day, the comment will not be so detailed, as a rule, as it would have been on the same day, because newspapers, always on the look out for news, do not like to use matters which make it necessary to refer to an article in a former issue.

In general, the history of the press laws shows that comment to replies was repeatedly a stumbling-block, and some attempts were made—for example in France and in Germany—to hamper or even to forbid it.

A particularly disagreeable though rare manner of comment consists in interrupting the reply by editorial remarks. The writer of the reply is thus unable "to finish speaking." The press law of Latvia forbids such remarks "in the text" of the reply; the courts have often declared this manner of comment to be inadmissible.

Content of the Reply.—With one exception, the press laws do not contain any provision regarding the heading of replies. Few writers of replies think of it; they write a letter to the editor, not an article, and leave the form to him. It would seem most convenient if the reply were given the same heading as the article. Indeed, this is the rule but sometimes even a heading contains a falsehood. If, for instance, an article is headed: "Chairman of the X Bank resigns," the reply stating that the chairman will not resign cannot be published under the former title. It was not for this reason, however, that press laws did not lay down a rule about it. The fact was decisive that, when the first pro-

visions about the right to reply were issued, headings were not so usual as to-day. Many paragraphs were printed without any heading, and only under the same general title, such as " News from abroad," " Law reports," and so on. Leading articles were sometimes given the date of the current issue as a title. Therefore it was not necessary to lay down rules regarding headings for replies. The readers of those days were not spoiled ; striking headlines were not needed to attract their attention.

In consequence of this, and in order to avert the attention of the readers, some papers to-day print the reply without heading if they feel it to be vexatious or disagreeable. Moreover, should it be published following a long and probably uninteresting article, separated from it by a thin line, the reply will be noticed only by the few people who were patient enough to read the article to the end. The other readers would at best assume that it is the last part of the preceding article. It is not unusual to place the reply immediately after a striking advertisement, overshadowing the reply and making it almost imperceptible. Only a trained eye can notice such replies. When in cases of this kind proceedings are taken by the disappointed writers of replies, the courts dismiss the action, as the law does not contain provisions regarding headings.

Only the Czechoslovakian law of 1933 demands (in Art. 11, 4) that the rectification should bear the title " Press Rectification " (*Presse-Berichtigung*). But as the law does not order the heading to be set up in a type usual for articles of corresponding length, a nettled editor is given the opportunity of composing the title in so small a type that it will not be easy to find the reply, especially if it is badly placed.

The wording of a reply results from its nature. It is usual and expedient to begin with a reference to the provisions concerned, in order to make it clear that the request does not appeal to the kindness of the editor, but is based on the force of the law. It is also advisable to remind the editor of the time limit for publication, of certain placement and type. For example :

DEAR SIR,

With reference to Article . . . of the Press Law of . . . I request you to publish in the next issue, in the same section, and in the same type the following rectification of your article (title) which appeared in the *Daily* . . . of . . ., No. . . ., p. . . .

(Content of the rectification.)

Yours faithfully,

(Writer's signature.)

If a legal representative signs, a power of attorney may be added.

The sole press law which contains some instructions about the requirements of a rectification is the above-mentioned Czechoslovakian law of 1933. " In its introduction," it says, " the rectification must refer to the title and number of the paper in which the communication was published, and possibly to the heading of the article ; at the end, the name

of the person who requests the rectification must be given." Unfortunately, the most important requirement, the reference to the press law, distinguishing the rectification from a letter to the editor, is omitted in this regulation.

The French law mentions (in Art. 4) the following parts of a reply: address, the salutations, usual expressions of request and the signature. The other press laws do not deal with the matter.

The content of a reply depends upon whether a reply or a rectification is intended. As to rectification, the press laws give corresponding directions. German law demands " a correction of facts," Austrian law " a rectification of communications of facts contained therein," Yugoslavian law " a correction of inexact facts or allegations," Hungary " a rectification concerning statements," Norway " a contradiction of an actual statement," Latvia " a refutation or explanation, limited to the exposition of facts." In Czechoslovakia " the writer of the reply can merely state facts which correct or deny the facts contained in the article; but he can also restrict himself to a simple denial of the truth of the facts contained in the article."

All these provisions have one meaning: rectification must strictly avoid opposing assertions to assertions; it serves only to correct facts, and nothing but facts.

But there are rectifications which also purport to be replies. The most significant example is given by the press law of Colombia. On the one hand, the law speaks of " corrections or explanatory statements concerning . . . actions of persons," but, on the other hand, replies to attacks are allowed. Other press laws also try to combine the advantages of rectifications and replies, for instance the law of Guatemala, which calls the reply " elucidation, correction and explanation."

Naturally most press laws demand that the reply must be published without any changes. Indeed, a small alteration can bring about an entirely different meaning. Therefore the conscientious sub-editor, accustomed to finish off the manuscripts and to eliminate stylistic mistakes, must lay down the blue pencil if he is handed a reply, although his collaboration may be sometimes of use to the writer of the reply. He may console himself by remembering that in this case the writer of the reply alone is responsible. Therefore, if a reply is not in compliance with the law, owing to an expression or for another reason, the editor is not allowed to omit or to alter it. The reply is to be published in full or not at all.

Some press laws paraphrase this rule by stating that publication must take place " without additions and omissions " (Germany, Austria; also in Yugoslavia, but with the further addition: " without interpolations "). The Japanese law says " inserted in full," the Norwegian " without alteration," and so on. The French law simply says: " without any interpolation."

Accuracy of the Reply.—The purpose of the reply is to oppose to the contentions of a newspaper those of the person concerned or attacked.

The reader may form his own judgment. As the paper need not produce evidence that its contentions are correct, the reply also is not bound to state the truth. It is not a deposition of a witness, but rather a defence, just as the attack of the paper is not always a sober statement, but often a spirited accusation. Both accused and prosecutor incline to exaggerations which are of little help in finding the truth. On the other hand, as the assertions are made in public and can be proved, both sides should as a rule be interested in the truth. The court is less interested in it. If a complaint is made against a paper because it refuses the publication of a reply, the court is only called on to examine whether the reply conforms to the formal provisions of the law. The truth of the reply is not under consideration.

An important development took place a few years ago. The Hungarian press law of 1914 (Art. 20, 4) provides that the editor must publish the rectification, provided that its "falsity cannot be proved at once decisively." For the first time the question of the correctness of a reply was raised by a press law. But it was only a small improvement, for it is not easy to demonstrate the falsity of assertions "at once" and "decisively." Two press laws issued in 1933 and 1934 provided the means to prevent the frequent abuse of the right of rectification.

The Czechoslovakian press law (1933) states (Art. 17): "When a rectification is published, and the writer knows it to be untrue, the proprietor of the paper can demand payment of the costs of the insertion and of damages caused by the publication."

The Austrian law (1934) accepted this idea and formulated it more clearly. The proprietor is entitled to demand payment at advertisement rates if the rectification is untrue. With regard to the proceedings to be instituted in the courts, the law (Art. 24, 7) orders: "If an incorrect rectification is submitted for mischievous motives, the proprietor of the paper may claim a reasonable compensation up to 1,000 Austrian shillings for injuries suffered. If the claim is allowed, the proprietor may publish the judgment in his paper within a certain time limit at the accused's cost." This new provision is very important. An untrue rectification creates a great risk for the writer, for not only does he become liable for the subsequent costs, but he may be declared by the court to have stated a falsehood, which, in turn, may prompt a corresponding comment by the paper.

Refusal to accept Reply.—Press laws demand that the reply should be published as soon as possible. If a newspaper refuses to publish it without good reason, it should be compelled to do so by speedy proceedings. Such proceedings form the backbone of the laws of reply, for their most important purpose is to furnish persons or institutions with an opportunity for immediate reparation. The Yugoslavian law emphasizes this purpose by stating (Art. 14) ". . . a speedy decision is desirable in the circumstances . . . a case concerned with the refusal to publish a correction differs essentially from all other legal proceedings."

Generally, the reply must be published in the newspaper in the first or second number appearing after its receipt. The pertinent regulation reads as a rule: " . . . within three days " including the day of delivery and the day of publication. If, therefore, the reply arrives on Monday, the publication must take place in Wednesday's issue at the latest. The Portuguese law of 1918 states that the reply must be printed at once, but the law in force since 1926, following the French regulations, demands publication within three days after its receipt. In Rumania the reply must appear " in the second number." The Yugoslavian law contains the shortest time limit: " . . . in the first number to appear after the correction has been received by the editor, but if on that date the office of the paper is already closed, the reply must be published in the first number to appear after that date."

In Germany a similar exception is provided: " . . . in the number immediately following upon its reception, provided that such number is not already set up in type." There is an exception in the press law of Haiti, allowing the extraordinarily long term of a fortnight for the publication of a reply.

In France a special rule applies during the time of general elections. In those days of high tension, the reply must be published within twenty-four hours. The text must be in the editor's office at least six hours before the paper is printed. For this purpose the editor at election time must announce in the courts at what time he will start to print his paper. The bad impression which might be created among the electors by an attack against a candidate should be corrected as soon as possible. The proceedings are also highly accelerated at times of election.

Unless the reply is published in accordance with the law the injured party may sue the responsible newspaperman. In Greece the injured party is relieved of this task. The law of 1918 states: " In any case of refusal to insert the correction or answer, the editor, proprietor or director is bound to deposit it within the time-limit of three days, together with a statement setting out the grounds on which his refusal is based, with the Public Prosecutor of the Court of First Instance, who is entitled to order any modification of the publication he may deem right." Accordingly, proceedings take place automatically. It is clear that newspapers will examine the replies thoroughly, as they are under the obligation to show in a written statement the reasons for the refusal and know that the Public Prosecutor will deal with their arguments.

The trial should take place with the greatest possible speed. Press laws agree on this point, as far as they contain regulations concerning proceedings. According to French law, judgment should be given within ten days. In order to prevent delay in consequence of an appeal,[1] the law of September 29, 1919, ordered that the reply should be published

[1] The proceedings (1919–26) in the matter of a reply in the well-known periodical *Revue des Deux-Mondes* are famous, since they lasted so long that the reply could only appear after six years and fifteen days.

as soon as judgment has been delivered. An appeal against the judgment, which must be decided within ten days, cannot delay the publication. In time of elections the proceedings are still simpler : judgment must be given within twenty-four hours, and the summons may be delivered at any hour by a special order of the President of the Tribunal.

In Austria the court must give judgment without delay, " if possible, within twenty-four hours " ; an appeal must not delay the publication of the reply. In Czechoslovakia the judgment has to take place " in the shortest possible time." The first hearing must be fixed for the third day at the latest ; an adjournment is only admissible for three days. The Hungarian press law (1914) demands that the hearing of the case must take place within three days. It is remarkable that this hearing is not public, but both sides or their representatives may attend and make objections. This exclusion of publicity is intended to prevent the appearance of reports which deal less with the real case than with the attacks by the paper and their background, and thus give occasion for stirring up scandalous affairs.

The appeal must be lodged within twenty-four hours, and must be decided within three days. A further appeal is not allowed. According to the Yugoslavian law (1904) an appeal is not permitted ; the judgment of the Court of the First Instance is final.

In Guatemala the reply, the publication of which has been ordered by a judgment, must be printed on the first page and in the first column, regarded as the most favourable place.

Some press laws are satisfied if the reply is published by the responsible newspaperman. In addition, other laws inflict fines. French law provides fines of from 50 to 500 francs, Italian law of from 100 to 1,000 lire. Rules regarding fines are also to be found in the laws of Belgium, Luxemburg, Finland, Norway, Yugoslavia, Greece ; further, of Syria, Egypt, Colombia, Panama. But the fines actually inflicted are relatively low. In France a higher fine than 100 francs is rarely inflicted ; mostly they are lower than 50 francs—the lowest fine provided by the law. According to the Belgian Code Penal of 1867, which upheld the right of reply created in 1831, the fine amounts to 20 florins for every day of delay. In Rumania the editor must pay 120 lei for every day of delay ; the money is paid to the person mentioned in the article as compensation for the injury he suffered. There are no detailed provisions concerning the conduct of the legal proceedings, save that : " The authorities may force an editor to publish such a reply."

In Guatemala the court does not inflict the fine as a matter of course, but the writer of the rectification is entitled to demand a payment of 50 pesos, for the benefit of the municipal funds, if the rectification is not published as the law demands. The Portuguese law of 1926 is particularly severe. The court, which has to make its decision within twenty-four hours, must order the insertion and pass a fine of 500 escudos—not up to 500 escudos ! No appeal against this judgment is admitted. Further,

the Portuguese law, unique in this respect to my knowledge, provides a particular procedure in matters of publications which do not comply with the provisions. Should, for instance, the rectification be changed by the editor and the sense misrepresented, or should it be inserted in the wrong place or printed in another type, the rectification must appear again on the next day, corrected in due form and in the right place. Should the same or another change, falsifying the sense, take place again, the director of the paper will be condemned to 1,000 escudos and the paper will be suspended for two months.

The Austrian press law of 1922, as amended in 1934, containing very modern regulations and utilizing fully the experience of the courts, establishes the following types of offences :

(1) The publication did not take place within the prescribed period. Fine up to 250 Austrian shillings.

(2) The publication did not take place in the manner laid down by the law, *i.e.* not in the same part of the paper or not in the same type. Fine up to 250 Austrian shillings and an order for publication.

(3) The publication was refused without good reason. Fine up to 250 Austrian shillings and order for publication.

(4) The publication was only refused because the responsible editor, owing to an excusable mistake, did not consider the rectification to be a correction of the original statement. The court must order publication and remit the fine.

(5) The refusal of the correction in the form demanded was admissible on the ground that it was not confined to a correction of the original statement. The court will acquit the responsible editor and determine what portion of the correction is to be published.

The latter provision opens a new way in legislation. It is not an easy task to draw up a rectification restricted to a communication of facts, particularly if the original article does not state facts alone, but reproduces opinions and draws conclusions. The new regulation is meant to prevent a rectification being rejected owing to a small mistake, thus depriving the offended person of his right ; but on the other hand, the newspaperman should not be sentenced if he believes that the rectification does not meet the requirements of the law. Therefore the court itself will adapt the rectification to meet the provisions of the law. The plaintiff's interests are satisfied without considerable delay, although the rectification is defective, and the newspaperman who acts in good faith is not called to account.

The Czechoslovakian law adopted this idea, and provides for a more distinct co-operation in the drawing-up of the rectification. If the rectification does not comply with the regulations of the law, the court will draw it up with the consent of the replying person, in order to make it correspond to the law, and then order the responsible editor to publish the revised statement. But the writer of the reply has to pay the costs of the proceedings.

According to the Czechoslovakian law, the responsible editor will only be fined if he intentionally omitted to publish the rectification as a whole in the prescribed form. In order to stress the mild character of the penalty, it is expressly described as a "fine" (*Ordnungsstrafe*) and is limited to one thousand crowns at the most.

The Hungarian law deals with the possibility that the rectification may be refused by the paper because it does not comply with the requirements of the law. If in this case the injured party produces at the hearing another statement conforming with the above-mentioned requirements, the court orders the editor to publish this last-mentioned statement. But the co-operation of the court in drawing up the reply as provided by Austrian law is not envisaged in this case. The assistance of the court in correcting the rectification is implicitly admitted by the Yugoslavian law of 1904, as modified in 1921. If publication is refused and the writer of the reply complains, the court frees the editor from responsibility, or decides that the rectification should be printed either "as originally submitted or subject to any corrections which are necessary," or it may condemn the editor to the payment of a fine between 300 and 600 dinars, or to a term of imprisonment of between one and two months.

These new ideas are only to be found in the press laws of the Central European group. Rectifications are protected from the waste-paper basket, which was their inevitable destination if they did not exactly meet requirements of the law. A very small mistake can affect a rectification so as to give the editor an opportunity of refusing it.

When the court decides that the reply must be published, publication should take place with the greatest dispatch. The press laws provide various measures directed towards this purpose. In Austria the courts order that the rectification must be inserted in the issue of the periodical immediately following the pronouncement of such order, or in the subsequent issue; or, if such pronouncement is made in the absence of the accused editor, the rectification must be inserted in the issue of the periodical immediately following the service of the order upon him, or in the subsequent issue. Whenever the court pronounces that a rectification must be published, it must order at the same time that in case of non-compliance with the provisions mentioned above, further publication of the periodical shall cease. Each issue of the periodical published in contravention of this order constitutes an offence, for which the responsible editor shall, at the instance of the person concerned, be fined up to 250 Austrian shillings.

A running fine, in addition to the fine on refusal of publication, is also provided by the press law of Norway. In Finland too the court may, besides inflicting a penalty up to a maximum of 500 marks, order the editor-in-chief to fulfil his obligation "under pain of an additional fine."

In this regard the Portuguese law of 1926 is very severe. Should the paper refuse to publish the rectification, it will be suspended for three

months and its director punished for disobedience. In Guatemala the responsible newspaperman will be condemned to two months' minor arrest, without the option of commutation, if he does not publish the rectification, although he was sentenced to do so. Besides this, judgment is to be published in another periodical at the expense of the accused.

A remarkable punishment is provided by the Hungarian law, if the editor fails to publish the rectification following an order by the court. The court " may order him to publish it as often as the court deems necessary ; the court may also order the rectification to be published at the expense of the negligent editor in one periodical or more, appearing either at the same place or elsewhere. If the court's decision has been disregarded by order of the publisher, the latter must bear the expenses incurred by publication."

An interesting provision regarding the case of a correction not being published in the manner ordered by the court is to be found in Czechoslovakian law. Upon application by the person demanding rectification, the court may order that all numbers of the periodical issued after the time limit for publication has passed should be confiscated provisionally until it is proved to the satisfaction of the authorities that the rectification has been published correctly. An appeal against such a decree cannot delay the confiscation, but it will be rescinded if the editor proves that the rectification has been published.

The publication may not be delayed by an appeal, unless the appeal to the next instance is directed against the wording as drawn up by the Court (Art. 14, 6 of the Czechoslovakian law of 1933). But suppose the Court of Second Instance reverses the judgment ordering publication because the rectification does not comply with the regulations ? In this case the responsible editor is entitled to publish the decision ordering the cancellation and is thus enabled to inform the readers that he was compelled by the court to print a rectification which was not in compliance with the law. Two press laws, the Austrian (1922) and the Czechoslovakian (1933), do not rest satisfied with this theoretical victory. According to the Austrian law, the responsible editor is entitled to publish the judgment of the Court of Second Instance at the plaintiff's cost. In Czechoslovakia also the Court of First Instance must charge the rectifying person, at the demand of the responsible editor, with the costs for the insertion at the average rate for advertisements in the paper.

The Japanese law provides two possibilities for correcting a false statement : a spontaneous correction by the paper or the insertion of a letter of correction. On the whole, this law is very polite in its tendency. For instance, it does not suppose that anyone can be injured by a paper, and only admits the possibility of " errors in items."

In Bulgaria a right of reply on the French model was introduced in 1887. But vehement political contrasts and violent disputes in the press caused such abuses of this right that it was abolished. Those offended by a newspaper now have the opportunity of suing it and of demanding

publication of the judgment. The court names the papers in which the judgment should be published at the cost of the accused editor.

Suspension of Publication of the Newspaper.—It may happen that publication is delayed or interrupted owing to external circumstances. It may occur that on account of holidays the paper does not appear within the time limit provided by the law, usually three days.[1] Most of the press laws which order publication within three days overlook this difficulty. The Czechoslovakian law only states: "If the periodical does not appear during this time, the rectification must be published in the next number." But this principle applies implicitly to other press laws, as the non-appearance of a newspaper owing to a holiday amounts to *vis maior*. Those press laws which order that the rectification is to be published in the first or second number after its receipt would appear to be clearer in this respect, *e.g.* the laws of Austria and Hungary.

It may happen that a paper is confiscated or ceases to appear. With regard to the former case, the Czechoslovakian law states that the rectification is to be published in the new issue of the confiscated number, and if no new issue is to be printed, in the first number after confiscation. In the latter case the same law orders that the court upon demand may allow the rectifying person to publish the rectification in one or more papers named by the court at the cost of the editor or proprietor of the offending paper. In France, in the absence of a provision of this kind, the courts decide in a similar sense; if a paper which should have published a reply has ceased to appear, insertion in another paper is ordered.

Finally, since it may happen that the rectification could be printed only in a part of the edition, the above-mentioned law provides that the publication must take place in all issues of the paper. The possibility that the responsible editor of a paper who was ordered to publish a rectification is no longer responsible is mentioned in the Austrian law of 1934. In this case his duty is passed on to the succeeding responsible editor of the same paper.

The requirements of the law are fulfilled with the publication of the reply. It is the concern of the injured party, and not of the court, to examine whether the reply is printed according to the law, and to lodge a complaint if this is not so. Nevertheless, the Hungarian law provides that the editor, after having been ordered by the court to publish the reply, must send to the court the number containing the rectification.

Only in Poland the law (1928) demands that the issue of the paper in which the rectification is published must be sent to the writer of the reply, at his own cost.

Official Rectification.—In some countries where an opposition press criticized Government, authorities and officials the rules in the matter of reply were felt to be too lenient. Therefore the Governments created a new institution to discourage critical remarks regarding the activities of

[1] A recent example: In England there were no daily papers on December 24, 25 and 26, 1939.

the public administration, *i.e.* official rectification. The hitherto existing right of reply continued as a private right.

Official rectification enjoys greater privileges than private reply; therefore it is far more burdensome to the papers. As a rule it must occupy the best place, to the disadvantage of the paper. The reader is disappointed when he finds a long report to the effect that the article of the previous day on some events concerning any authority is incorrect just at the place where he used to read the most important news or a leading article. It is not less annoying if a newspaper is not allowed to add any editorial remarks to an official rectification in the same number. The reader, generally not well acquainted with the law, receives the impression that the paper told an untruth and was reluctant to reply. The paper may give a comment on the following day, but for this purpose the matter must be repeated in parts, also the risk of a new official rectification of the comment must be run. Finally, the fines for a refusal or incorrect publication are higher, *i.e.* usually twice the amount fixed in the case of private replies.

It is obvious that a strict application of these regulations not only made the critics more cautious, but also aroused an increasing aversion against official rectification. It so happened that when after the war the Austrian republic was established in 1918 and democratic laws were issued there, the exceptional position of official rectification which had existed in the Austro-Hungarian Monarchy was removed, and authorities and officials were not granted any greater privileges in replying to newspapers than the people. Special regulations about official rectifications are absent in the laws of Hungary, Yugoslavia, Denmark, Norway and some other countries.

Like the private right reply, official rectification originated in France, *i.e.* by Art. 8 of the law of June 9, 1819; rectification was then called "publication officielle." Art. 19 of the decree of February 17, 1852, gave it the name "communiqué." But both "publication officielle" and "communiqué" not only served to correct inexact reports about authorities and official fonctionnaires; the authorities, particularly under Napoleon III, often made use of them for other purposes and sent communications to the papers to be published, even if no error had occurred. Art. 12 of the law of July 29, 1881, was the first to introduce the name "rectification."

Official publications of this kind, not being always official rectifications in the strict meaning of the word, but rather rectifications of public opinion, are also known in other countries. In Germany only papers or periodicals which accept advertisements are "bound to reproduce at the request of public authorities any official notices communicated to them by such authorities in one of the two following numbers of the paper, at the usual rates for the insertion of advertisements." A similar regulation exists in Finland.

Austria, in order to counter the violent Nazi propaganda, issued in

1933 an order about the publication of certain official communications. They were often polemical replies to articles published in Austrian papers and abroad, and had to be printed " in the political part without interpolations, omissions, additions and contrary remarks, also without charge, and as to the headlines and the text, in such a manner that they did not seem inferior to other important news or reports of the paper." These communications, which were delivered to the Austrian papers by official news agencies, were distinguished from other contributions by the word " Pflicht " (duty) at the beginning of the text. Opposition papers made fun of it, and printed the communications under this heading—literally they had to publish the communication " without omissions "—in order to show that the publication was compulsory. This was soon forbidden, with the result that the average reader did not recognize the source of the article and might assume that it was the opinion of the paper. The punishment for contravention was rather severe—a fine up to 2,000 Austrian shillings or imprisonment up to three months. Both fine and imprisonment could be inflicted together ; an appeal was only admissible if the fine imposed was higher than 1,000 Austrian shillings and the imprisonment for more than six weeks.

In Syria, too, regulations may be found which deal with the publication of official communications at advertisement rates.

French law orders that the publication must be placed at the top of the paper, *i.e.* in the first column of the first page. This is the most prominent place in French papers. It must appear in the next number, and may occupy twice the length of the article which it corrects. Contraventions are punished by fines varying between 100 and 1,000 francs, while the regulations on private replies only provide for fines from 50 to 500 francs. The provisions regarding official rectifications are drawn up in accordance with this model in Italy, Rumania, Turkey, Portugal and in other countries the press laws of which are adapted to the French example.

Variations between them are unimportant. While most laws demand insertion free of charge, the Italian law orders official rectification to be paid for. In Haiti a charge of 50 centimes per line is provided. In Turkey the publication may be placed in the same column as the article, and in Greece the law refrains from demanding the insertion at the top or in the same place. The law of Haiti requires governmental approval of the official rectification before it is sent to the paper ; the last regulation of Greece (1938) demands approval by the competent member of the cabinet ; other laws are satisfied with the formal official signature of the injured person. On the whole, the provisions concerning proceedings, responsibility, delivery, prescription and so on are almost the same as those concerning private replies.

Since 1922 a particular kind of official publication has been in use in Bulgaria. It is there a privilege, reserved for the National Assembly, the Government, the Cabinet and for every single member of the Cabinet.

Rectifications or denials submitted by these authorities and persons must be published at once. The penalties are severe and amount to one month's imprisonment or a fine up to 20,000 levas. The Czechoslovakian law (1933) contains a similar provision : If the President of the Republic, the chairman of a Legislative Assembly or a member of the Cabinet have reason to correct a paper, they need not do it themselves. The authorities entrusted with the management of their affairs can demand the acceptance of the rectification. Therefore these high personalities are not compelled to enter into polemics with opposition papers or with those of doubtful reputation, and thus need not run the risk of impairing their prestige. An additional provision of 1934 (July 10) orders that this rectification may occupy more than treble the space of the article—treble is the usual maximum according to the law—but half a column at most. The rectification is not restricted to facts which are to be corrected, but it can also contain other facts if connected with the matter of the article and if it represents a contribution towards a fuller clarification of the case. Moreover, the authorities, courts and other public institutions may leave it to the Public Prosecutor to expedite an official rectification, who will do it, of course, with good effect.

Conclusion.—Efforts to reform the law of reply can be observed in many countries. Their aim is to remove some abuses in the application of the law and to introduce clear legal regulations in matters of a right of defence open to everyone who is attacked by a paper. No doubt the rectification of facts gains ground. Even in France proposals were submitted in recent years to supersede the reply (*réponse*) by a reply limited to rectification (*réponse rectificative*).

Nevertheless, replies and rectifications have stood the test. Countless errors and falsehoods were corrected by them, the reputation of a great many people was restored. Since papers take replies amiss, as they are thereby forced to admit an error to their readers, they become more cautious. The number of press actions is decreasing, because many cases of a less serious nature, which otherwise would certainly have led to proceedings, can be settled by a reply. A correction which is published quickly has often a conciliatory effect. Most persons about whom a paper publishes a falsehood are satisfied with the publication of the reply —the question of damages in connexion with libel action need not be discussed here—and are not interested in bringing an action against the paper. But the papers regard the reply as a smaller evil than a lawsuit, which is more expensive, causes numerous troubles and may involve risks.

The publication of a reply does not prevent the injured person from enforcing claims arising from an illegal attack. This is expressly emphasized by many laws. But a well-timed reply will be certainly regarded as an extenuating circumstance. Now, as before, a spontaneous correction by the paper—the Japanese law mentions this possibility—is better than a reply according to the law. If it is possible to agree upon a text which settles the case, the interest of both demands that it should be done.

THE TEACHING OF INTERNATIONAL AND COMPARATIVE LAW.

THE annexed report of a committee of the American Bar Association (Section of International and Comparative Law) [1] has been communicated to the society by the courtesy of Mr. James Oliver Murdock. Its importance in relation to questions of the teaching of International and Comparative Law is manifest, and it is therefore reproduced in full with the omission only of its formal parts.

The recommendations of the committee merit the careful attention of lawyers in all English-speaking countries. They represent a constructive attempt to provide an answer to problems which are common to all our law schools. Both in the United States and in England legal curricula are apt to be overloaded and the burden imposed on students is as much as they can bear. Students are, moreover, disinclined to welcome additions to an examination syllabus of a non-vocational subject which has no apparent value from the " bread and butter " point of view.

The problem is, in substance, the same both as regards International and Comparative Law. It is true that in England a partial solution has been found in the case of Public International Law, which is a compulsory subject in the universities but not in the professional law schools, although it can, in certain circumstances, be evaded by university students. But the situation here does not differ essentially from that which obtains in the United States. As regards Comparative Law the teaching in England is confined to a few of our universities and takes the form of seminar instruction given to a selected body of advanced students. The difficulties involved in an extension of this teaching to undergraduates are obvious—there is little or nothing in the shape of textbooks in the English language suitable to beginners, and the ever-present problem has to be faced of the manner in which instruction in another system of law can be imparted with any hope of success to students who are still in the apprentice stage as regards their own law. For the reasons given in the report of the American Bar Association the importance of comparative study is, nevertheless, such as to justify a serious attempt to introduce it into the legal curriculum, and it may become even more

[1] The Report was adopted by the section at its Philadelphia meeting on September 10, 1940. It was drafted by the following committee: James Oliver Murdock, Chairman; Joseph W. Bingham, Edwin M. Borchard, Walter H. E. Jaegar, Philip C. Jessup, Roscoe Pound. See 26 *American Bar Association Journal*, p. 115.

important hereafter in view of the changed situation in Europe. Whether the solution proposed by the American committee is the best or not is a matter which cannot be determined by anyone who has not a first-hand knowledge of legal education in the United States. So far as English law students are concerned the writer's preference is for the comparative study of a selected topic, complete in itself and not too wide, which could be studied as it emerges from not more than two systems, *i.e.* English law in comparison with Roman law or the French Civil Code. Such comparison would avoid the bugbear of linguistic difficulties, and if the subject was chosen with due care would not be too severe a task for the teacher and his students. In this way it may be possible in the words of the report to make a law student " conscious that there is more than one way of doing things " and to assist him to obtain " the necessary relative criteria from which to reason and exercise his imagination."

H. C. GUTTERIDGE.

INTERNATIONAL LAW RESOLUTION.

The resolution regarding International Law reads as follows:

WHEREAS, International treaties and customary laws are part of the municipal law of the United States, as declared by the Constitution in Article VI, paragraph 2, as to Treaties and repeatedly by the Supreme Court as to customary International Law:

WHEREAS, The Courts from time to time fail to give full consideration to international legal obligations, largely because the Bar overlooks them, with the result that the basis is created for the presentation of international diplomatic claims:

RESOLVED, That the American Bar Association considers it most desirable for law schools to take practical measures to bring to the attention of all law students the fact that international treaties and customary laws are part of the municipal law of the United States, which State and Federal courts are obligated to apply in cases involving international justiciable questions.

The most practical method of making this resolution effective would be for all students to take a course in international law in order to familiarize themselves with its principles, its relationship to municipal law and its appropriate application in national courts as part of the local law. The law school curriculum would thereby be supplemented and students would secure an understanding of the processes of adjusting international controversies by justiciable methods, rather than by resort to war. In the event that it is impracticable to make international law a required subject for undergraduate law students, it is suggested that two or more special lectures be given to senior students on the relation of international law to municipal law and that teachers of other courses discuss the pertinent principles of international law in a correlated manner in their teaching of municipal law subjects. For example, the necessity for the courts of each country to recognize the treaty and customary law rights

of aliens, which require the application of the international standard in municipal courts, could be emphasized in courses in constitutional law,[1] procedure,[2] etc. The Section's Committee on International Law in the courts of the United States has made a comprehensive collection of the decisions of State and Federal courts which, when published, will be of material assistance in showing the great extent to which International Law is applied in municipal courts.

Comparative Law Resolution.

The resolution regarding Comparative Law reads as follows :

WHEREAS, It is desirable for law schools to offer courses in Comparative Law, but few law schools offer such special courses and few students learn the principles of the modern civil law :

WHEREAS, It is impracticable for most law schools to offer special courses in foreign and comparative law, because of the large number of courses already offered, inadequate source material in translation and the lack of student demand :

RESOLVED, That the American Bar Association considers it most desirable for each subject in the law school curriculum to be co-ordinated by the respective instructors, so far as practicable, with cognate subjects in the modern civil law, so that in treating important common law principles and rules the cognate material in the modern civil law will be correlated and compared.

The difficulties of offering separate courses in Comparative Law are so substantial that it is believed that the most practical approach to Comparative Law teaching is made by correlating cognate principles of modern Civil Law with the principles of municipal law in courses offered in the regular curriculum. As pointed out by Dean Roscoe Pound in his address to the section meeting in Washington on May 15, 1940, the importance of Comparative Law is to make the lawyer conscious that there is more than one way of doing things. There is a complete difference in technique between the common law method and that used by the civilian, which makes it almost impossible for men sitting side by side on a tribunal to look at things the same way. For example, Dean Pound recalled that the Common Law lawyer thinks that what one does through an agent he does himself. The civilian believes that there is a contractual relation, in that the agent is under a contractual duty to account to his

[1] *Missouri* v. *Holland*, 252 U.S. 416 ; Hudson, *Cases on Int. Law* (2nd ed.), p. 850 ; *Nielsen* v. *Jonson*, 279 U.S. 47 ; Hudson, *Cases of Int. Law*, p. 895 ; Scott and Jaeger, *Cases on Int. Law*, Chapter 1, Section 3, p. 21 (see especially references in notes) ; Charles Pergler, *Judicial Interpretation of International Law in the United States* (The Macmillan Company, 1928), p. 222.

[2] *United States* (*B. E. Chattin*) v. *The United Mexican States*, United States-Mexico General Claims Commission, 1927, Opinions of Commissioners, 1927, p. 422 ; Hudson, *Cases on Int. Law* (2nd ed.), p. 1085. See Scott and Jaeger, *Cases on Int. Law*, Chapter 8, Section 1, regarding claims procedure. See also Cheatham, Dowling and Goodrich, *Cases on Conflict of Laws*, Chapter VI, Section 1.

principal. In one case, this distinction made all the difference in the world : the United States had a treaty with Great Britain by virtue of which American fishermen were entitled to fish in British waters. The sailing crew would go to the spot and hire local fishermen to bring the fish on board. To a Common Law lawyer, the crew was fishing through its agents. To the civilian, the Americans weren't fishing at all. They had a contract with local fishermen, whereby they did the fishing and were bound to turn them over. In that case the Chief Justice of Canada, a member of the tribunal, had been brought up in one of the provinces that was under the Civil Law. He was able to explain to the civilian judge that, when they were dealing with transactions between two Common Law countries, it was necessary to adopt the doctrine of agency. Dean Pound stated that this is the sort of thing that arises continually and makes a great deal of trouble, unless a teacher who has become conscious of these things and worked hard to understand them can put the feet of the student in the right path to their proper comprehension.

Obviously, teachers must be trained thoroughly in Comparative Law by a study of those principles of Roman law that give us the technique and methods of understanding of the codes, the digests and the books of the commentators of those countries that constitute more than half of the world to-day. The teacher can then bring up the Roman law principles as they arise in connexion with the teaching of Common Law. This method is especially indicated in teaching Public and Administrative Law, because of the late development of these branches in the common Law system as compared with the much earlier development in the civil law countries, particularly in France. The teacher of legislation, who realizes the achievements of the Civil Law in putting things in universal form in a short compass, will perform a great service for Legislative Law-making in the future.

A number of inquiries regarding reference material for study have been received from interested teachers. The following brief list should be helpful :

Buckland & McNair, *Roman Law and Common Law. A Comparison in Outline.* London : Cambridge University Press (1936).

Buckland, *A Textbook of Roman Law* (2nd ed.). London : Cambridge University Press (1932).

Buckland, *The Main Institutions of Roman Private Law.* London : Cambridge University Press (1931).

Burdick, *The Principles of Roman Law and their Relation to Modern Law.* Rochester : Lawyers Cooperative Publishing Company (1938).

Holmes, *The Common Law.* Boston : Little, Brown & Co. (1881). See references to Roman Law.

Mackintosh, *Roman Law in Modern Practice.* Edinburgh : W. Green & Sons, Ltd. (1934).

Pound, 3 *Illinois Law Review*, p. 1.

Pound, 13 *Illinois Law Review*, p. 667.
Radin, *Roman Law*. St. Paul: West Publishing Company.
Sohm, *The Institutes; A Textbook of the History and System of Roman Private Law*. Translated by James Crawford Ledlie. 3rd ed. Oxford: Clarendon Press. London, New York: H. Frowde (1907).
Williston. Contracts (see notes at ends of sections).

An adequate foundation for legal reasoning is not laid when only the principles of one system of law are taught. The student does not have sufficient relative criteria from which to reason and exercise his imagination. A discussion of Civil Law principles for comparative purposes in most Common Law courses would show how various legal techniques have successfully dealt with the solution of similar statutory and judicial problems. It would also enrich the cultural values of a legal education. A well-trained lawyer should be more than a technician. He must be a resourceful social engineer in working out the pacific adjustment of controversies in a world which is growing smaller daily due to the rapidity of communications and transport.

AN ATHENIAN LEGAL ANTHOLOGY

In Honour of Professor Streit.

[*Contributed by* F. M. Goadby, Esq., D.C.L.]

The first volume of the *Mélanges Streit*, published at Athens by three of the professors of the University, contains some forty essays on various legal subjects contributed many of them by scholars of international distinction, and also a list of the publications of Professor Streit himself. About half of the number of the essays are in Greek, ten are in French and the remainder in German, English or Spanish. The single English essay, by Professor Baty, deals with the Private International Law of Japan. Other noteworthy contributors include Professor Arminjon, who discusses the new status of foreigners in Egypt under the Montreux Agreements, Professor Signor Bustamente on "Définition des Traités," Dr. Domke on International Payments, Professor Fragistas on the Contract of Insurance in International Private Law, Professor Janne on International Private Law and the Unification of Bills of Exchange and Professor Balogh on New Theories of Private International Law in Relation to Natural and Foreign Law. The whole volume contains 654 pages. We cannot claim the knowledge or linguistic proficiency requisite for adequate comment on more than a selection of these academic disquisitions, but a reference to a few of the matters treated may be of interest.

Jurisdiction in Egypt.—Three of the essays deal with aspects of civil and religious jurisdiction in Egypt. Professor Arminjon summarizes

(in French), with his usual grace and clarity, the origin and intended operation of the Montreux Agreements, Mr. Bamichas (Alexandria) and Mr. Moustaka (Cairo) consider (in Greek) respectively the Orthodox jurisdiction in Alexandria and the law governing testamentary succession of Egyptian Orthodox Christians. The Montreux Agreements do not seem to have attracted much notice in English legal academic publications, though the *British Year Book for* 1938 contains a useful account of their principal contents. In Egypt, of course, the matter has been much discussed and we may refer particularly to the admirable article by Judge Szaszy of the Mixed Courts published as No. 184 of *L'Egypte Contemporaine* (April 1939), and to the very complete account of the Conference, the comparative table of proposed and adopted texts and the detailed discussion of results issued from the office of the *Gazette des Tribunaux Mixtes* and compiled by Mr. Maxime Pupikofer and Assabghy Bey. The subject is one which presents many aspects. Mr. Arminjon limits his remarks to the position of foreigners in Egypt during the twelve years' transitory period now current, and draws attention to a few of the problems which are likely to present themselves. The problem which must engage the courts in applying Art. 31 is pointed out. This Article provides that the term "*loi nationale*" means "*les dispositions internes de cette loi à l'exclusion de ses dispositions de droit international privé.*" So also is the unsolved question as to the proper Court of Personal Status for citizens of the eight states mentioned in the Declaration of the Egyptian Government included in Part VI.[1] The remaining two Articles are more special in their scope and touch upon the same problem, namely, the juridical status of Orthodox Christians under the new situation created by the Montreux Agreements. Mr. Moustaka draws special attention to the provisions of the Décret-loi No. 91 of 1937, which categorically gives to the respective Courts of Personal Status in Egypt jurisdiction over foreign subjects who are adherents of the religious confession to which the court appertains. In Palestine, it will be remembered, the Government has tended to subject foreigners to the civil courts in all matters of personal status. Mr. Moustaka touches also upon the speculative question as to the final arrangements which will be made after the lapse of the twelve years' transitory period. He opines that matters of personal status arising between Greek Orthodox Christians will κατὰ πᾶσαν πιθανότητα fall to the jurisdiction of the Patriarchal Courts. Whether this is likely to be the solution may be considered very dubious. But the Egypt of 1950 seems a far cry in present circumstances.

British Marriage in Japan.—Dr. Baty's article is entitled "The Private International Law of Japan." He has not, however, much to tell us upon this subject. Such Private International Law as exists in Japan appears to be neither interesting nor, to any considerable extent, original.

[1] Three of these have since been swallowed up!—Czechoslovakia, Poland Austria.

" The whole modern Japanese law is," he says, " an artificial structure, engrafting Japanese traditional elements on a French and German basis." The traditional element is certainly dominant with regard to marriage, the subject which engages the particular attention of Dr. Baty. There appears to be no form of marriage known in Japan which is available for foreigners. " The sole form provided by the law of Japan is the inscription of the bride's name in the bridegroom's official Family Record (or the name of the bridegroom in that of the bride in cases where he enters the bride's family). . . . That, and that alone, is the essential of a valid marriage in point of form ; and it is obvious that it cannot apply to two foreigners. For a foreigner has, and can have, no Japanese Family Record." Dr. Baty dismisses, as based on a misconception, an unreported English decision in 1907 that there existed in Japan a civil registration system " similar to the secular marriage system alternatively in use in England." The Foreign Marriage Act, 1892, provides, of course, a form open when one of the parties is a British subject, but " it is impossible to say how far it applies to the former Colonies which are now practically independent. Also, it does not generally apply when one of the parties is a Japanese." There remains the possibility of a common law marriage. Dr. Baty is of opinion that two British persons of Scottish domicile would certainly be held in England, on principle, to be properly married in Japan *per verba de praesenti*, or even by living together as married persons, in accordance with the law of Scotland. Whether marriage *per verba de praesenti* is open also to domiciled Englishmen in such circumstances may be reasonably doubted in view of the decision of the House of Lords in *R.* v. *Millis*.[1] Dr. Cheshire hopefully seeks to limit that unhappy, and it would appear historically unjustifiable, decision, and to confine its operation to England and Ireland. He quotes *Catterall* v. *Catterall*[2] in support. It is at least our duty to hope with him, but the matter cannot be regarded as settled. There remains an uncomfortable doubt. Dr. Vesey FitzGerald has complained that to regard a Roman (civil) marriage as not a Christian marriage is " to brand with an unmerited imputation the marriages of St. Helena and St. Monica."[3] This is severe language ; but perhaps the Lords would not have gone so far as to consider themselves to be defining the limits of Christian marriage. As regards the less tremendous question, as to the requisites of a Common Law marriage, such cases as *Culling* v. *Culling*[4] (mentioned by Dr. Baty) and *Phillips* v. *Phillips*[5] show clearly that domiciled Englishmen are validly married if the marriage is celebrated before a priest in Anglican Orders, and it may be safely assumed that Roman Catholic Orders are also valid for this purpose.[6] Probably the same recognition may be given to the Orders of the Orthodox Church, though an extension to those of the Monophysite Churches is less obvious, more particularly as, following *R.* v. *Millis*, we

[1] 10 Cl. & Fin. 534. [2] (1847) 11 Jur. 914.
[3] L.Q.R. xlvii at p. 253. [4] (1896) p. 116. [5] 38 T.L.R. 150.
[6] Cf. the old case of *Lautour* v. *Teesdale* (1816).

are bound to treat the more "orthodox" Presbyterian Church as not "sound" enough for the purpose.[1]

These ecclesiastical subtleties, trifling as they may appear to many, might yet have a practical bearing. Not so long ago in Palestine there was neither a British Consul nor other marriage officer within the meaning of the Act of 1892. Even to-day there is, unless I am incorrectly informed, no civil form of marriage, the only local forms recognized being religious in character. But marriages of British subjects celebrated only in a religious form have taken place and a question of validity may arise in some subsequent suit.

Extradition of Political Offenders.—Professor Eustathiades (Athens) discusses (in French) what he regards as new tendencies manifested as to the extradition of political offenders. This country has, of course, long been a general asylum for political refugees, a fact accentuated in the last century by the "liberalism" of English opinion as opposed to the "illiberal" Continental systems. The strong action taken by the British (and French) Governments in 1849 in support of the Turkish refusal to hand over Kossuth to Russia and the harbouring in England of many Italian refugees from Teutonic oppression in Italy are striking examples.

> How changed is here each spot man makes or fills!
> In the two Hinkseys nothing keeps the same.

Natural jealousy of foreign dictation was possibly in the main responsible for the protests against the Conspiracy to Murder Bill of 1859 and the enthusiasm with which the acquittal of Bernard was greeted.

The question to which Professor Eustathiades primarily directs attention concerns the limits within which a crime should be considered to be political for the purpose of a refusal of extradition. He refers in opening to the murder of King Alexander and to the request on the part of the French Government for extradition from Italy of an alleged accomplice. This request was refused by decision of the Court of Appeal of Turin, which treated the crime as "political." The decision is approved by Professor Eustathiades. He rejects, indeed, the objection that the country making the request (France) was not that against which the crime was politically directed (Yugoslavia). This circumstance might have been a good answer to those who base the non-extradition of political offenders upon the inadequacy of the guarantees of an impartial trial in the country politically offended. "*Cette considération,*" he says, "*n'est pas la seule qui milite en faveur de principe de la non-extradition pour délits politiques ; il existe aussi une autre raison fondamentale qui se trouve à la base de ce principe, à savoir la non-intervention de l'État dans les affaires intérieures des États étrangers.*"

But Professor Eustathiades' main purpose is to discuss and expound the deliberations and agreements of the committee of experts which met

[1] Dr. Cheshire appears to consider episcopal ordination as the proper test. This may be so. In that case the episcopally governed Monophysites would take precedence of the non-episcopal but otherwise more "orthodox" Presbyterians.

at Geneva and the consequent Conference of 1937 which sought to establish a common front against political terrorism. His exposition and criticism are interesting. But it must be admitted, and the Professor is not inclined to dispute the fact, that the Conference was largely abortive. The purpose of the gathering was presumably to exclude so far as possible crimes of mere terrorism from the category of political offences. This object was not attained. Professor Eustathiades nevertheless optimistically opines that the Conference "*constitue une précieuse contribution scientifique même là ou elle devait échouer.*"

The English law as laid down by Sir James Stephen [1] in language approved *In re Castioni* [2] makes the existence of a political disturbance at the time of the alleged crime an essential feature. "There must be two or more parties in the State each seeking to impose the Government of their own choice on the other." [3] This is surely both sensible and adequate.

The Palestine Mandate.—Mr. Frankenstein, in his article (in French) dealing with the Interpretation of the Palestine Mandate, examines that document in accordance with methods of legal interpretation analogous to these applied judicially to Acts of Parliament. He asks, "What precisely does the Mandate say?" His inferences are based upon a strict verbal interpretation. Whether in the case of a document of this kind this method is so satisfactory as Mr. Frankenstein would have us believe may be doubted. Certainly it was unfortunate that the circumstances required so definite a statement at that early stage of the methods to be adopted by the British Government in carrying out a scheme so novel under conditions then not fully understood. The loosely worded Balfour Declaration, made at a time of stress and apparently *ex parte*, was a poor model. However, if we concede the soundness of Mr. Frankenstein's methods, his inferences are not without justification. "Home" is a word with almost sacred associations to English ears. Inadequately represented in a French dress by "*foyer*," Mr. Frankenstein not inaccurately speaks of it as "*le centre de la vie privée, l'endroit où on est chez soi, où aucun autre ne peut intervenir, sauf par autorisation de la loi, le lieu auquel on a toujours libre accès, le dernier refuge du travailleur modeste aussi bien que de l'homme d'État.*" A "National Home" for the Jewish people implies, therefore, a place to which all Jews have free access; the family is too large to be all accommodated in the old home, but all who will come are welcomed "home" and each has a family right to stay "*chez soi.*"

The primary and controlling duty of the Mandatory is to establish a National Home for Jews in Palestine. This duty it must pursue to the end, however bitter, even, it would seem, to its own undoing. So long as by any means, however costly and perilous, it yet remains economically

[1] *Hist. Crim. Law*, II, pp. 70-1.
[2] [1891] 1 Q.B. 149.
[3] *Re* Meunier, [1894] 4 Q.B. 415.

possible to absorb Jewish immigrants in Palestine, these means must be utilized by the Mandatory "*des considérations de politique extérieure et intérieure, l'attitude de la population et même une revolte ne peuvent dispenser le mandataire de son devoir d'instituer dans le pays un état de choses politique de nature à assurer l'établissement du foyer natural.*" Art. 2 of the Mandate mentions indeed other duties, *e.g.* the safeguarding of the *civil* and religious rights of all the inhabitants of Palestine. These inhabitants include, of course, the existing Arab population; but Palestine is not to be a national home for them, and non-Jews who have emigrated to Palestine since the Mandate have been wrongfully admitted. Jewish immigration must, however, be facilitated up to its extreme limit of possibility. This obligation is placed by Art. 6 upon the Administration of Palestine, and a careful distinction is drawn by Mr. Frankenstein between the Mandatory and this Administration. The "Administration" is an authority subordinate to and acting in the name of the Mandatory. It is concerned solely with internal affairs. Jewish immigration is not an internal affair; it is a fundamental element in the constitution of the National Home, and is the care of the Mandatory himself. The duty of the Administration, therefore, as laid down by Art. 6, is to facilitate this immigration, "to concede favours to Jewish immigrants to which they could otherwise make no claim."

It is on these lines that Mr. Frankenstein would disentangle the complicated racial and religious problems of Palestine. "*Fiat justitia, ruat coelum.*"

CONGRESS OF THE INTERNATIONAL ASSOCIATION OF FINANCIAL AND FISCAL LAW.

[*Contributed by* F. Bower, Esq., M.A.]

The International Association of Financial and Fiscal Law held its inaugural meeting at The Hague in 1939, and one of the first-fruits of its labours is the publication, in two neat volumes comprising about 350 pages in all, of a series of papers contributed by well-known authorities. For a proper appreciation of these papers it is necessary for the reader to recall the occasion and circumstances of their birth. The Association has set itself the aim to study all questions touching finance and taxation with particular attention to their international aspect. In a sense its first efforts are necessarily of a pioneer character, and there is a certain sense of uncertainty as to the direction in which the search should be directed in order to discover the fundamental principles which it hopes in time to note and define. For the purpose of its first discussions it has chosen the two subjects: (1) "The Taxation of Profits of International Companies." (2) "Would the Independence of Tax Law provide a Means of promoting International Agreements?"

By the choice of the first subject the aim has been to suggest a comparative study of the legislation of different countries on one particular question, namely the tax treatment of limited companies whose interests extend into the jurisdiction of more than one country. The result is a collection of fifteen papers each of which explains the legislation of its particular country. These are followed by two papers of a general character, one discussing the conception of a " permanent establishment " as a taxable unit in international agreements, the other tracing the development of the movement to avoid double taxation by means of international agreements.

A perusal of these papers on the first subject leaves the reader with a certain sense of failure. The subject has not produced the master-study which it deserves. Each exposition is well written from its native standpoint, but the author is still to be found who is able to trace from a comparison of the diverse legislation the common principles which in their general average define the " ideal " system in the Platonic sense.

As a collection of studies of national law on the subject these papers are inferior to the study which has been made by the League of Nations,[1] both in the number of systems brought under review and also by reason of the lack of the fixed criteria which the single compilator was able to lay down in the League of Nations publication. These criteria need to be applied by the reader of these papers in making his comparisons. But the papers are fresh and stimulating, and if they served no other useful purpose —an hypothesis which is not true—they compel a realisation of the difficulties inherent in formulating an " ideal " by the unconscious assumption by each writer that the system in force in his country is on the whole the most natural and reasonable one to adopt.

Undoubtedly the papers would have carried a greater value if the Association had been able to induce an official of some of the largest international enterprises to record the treatment which has, in fact, been accorded to his company. The papers are all by persons who by reason of their vocations are competent to speak on the theory, aim and interpretation of the legislation. It would have been valuable to have had the testimony of one or more of those whose vocations include the actual handling of tax problems on behalf of the international businesses in the various countries which levy a toll on their earnings. Such testimony would have revealed in startling fashion the strength, the weaknesses, the arbitrariness and in some cases the futility of the legislation in practice.

The second subject is more happy both in its choice and in the results it has produced. The subject is more congenial to professors of law and the contributors have risen nobly to the occasion. The question is put : " Would the independence of tax law from other codes of law promote international agreements ? " or to express it slightly differently, " If tax law were less bound to internal civil law, would it tend to develop a

[1] *Taxation of Foreign and National Enterprises.* League of Nations, C73, M38, 1932.

common form which would facilitate the development of a system of international tax law? "

The solution is expounded in six brilliant papers from contributors in Germany, Belgium, France, Rumania and Switzerland. The absence of a contribution from this country may be due to traditional insularity or to a tacit admission that revenue law is a creature of bureaucracy which is not worthy to be classed as law. However that may be, the doctrine of the independence of tax law is a familiar subject on the Continent, and the subject suggested by the Association was calculated to excite a ready response from exponents and opponents of that doctrine.

The contributors discuss the meaning of the term " independence of tax law." Independence is impossible unless the code is complete. The German word for independence (" Selbständigkeit ") suggests the quality or ability of standing alone. Until the tax code has defined all the terms it uses and embraced in its phraseology all the economic and legal situations and facts which come within its field, it must necessarily fall back on conceptions and terms which are borrowed from the civil code, which is older and more stable.

It is accepted that tax law must develop an independent code for dealing with certain facts because its motive is essentially the practical one of collecting revenue. It cannot consent to be bound by legal positions created by other codes of law, such as company law or penal law, if the result of such acceptance would be to permit the avoidance of an impost. For instance, the penal law may condemn certain forms of gambling or entertainment, but the tax law must recognize them because they produce income which is a taxable subject. But, generally speaking, the community at large, and the courts in particular, instinctively revolt at the idea of permitting tax officials to adopt complete liberty to set aside a legal fact and pay regard to the " substance " of a transaction in order to enforce a demand. No doubt this is one of the causes for the generally accepted principle that tax laws must be applied and construed literally. If the law does not enable an individual or a transaction to be taxed, the claim for tax must fail. It is for the legislature to remedy the position.

The writers, with one exception, conclude that to a certain extent the growing completeness of the tax code and its emancipation from other internal codes may produce a greater degree of similarity between countries, because all tax codes seek the same object, the collection of revenue, through pursuit of economic facts. This, however, is insufficient to build up an international code. Tax systems are born in politics and vary with the economic strength or weakness of the country and with the tolerance of different forms of tax by different national temperaments.

The creation of a code of international tax law is a work in itself which is independent of the development of the internal tax law. In tax questions there is no " conflict " of national laws. Each is complete and sovereign in itself within its territory. If two or more countries are able

to tax the same individual or source of income, there may be inequity or hardship or impediment to trade, but there is no conflict of law.

Therefore the creation of an international tax law can only be the result of agreements between taxing authorities deliberately made with the set purpose of facilitating trade or the movements of capital between the contracting parties. In this field the makers of the agreements are constrained to formulate their definitions to cover the economic facts they desire to tax or to exempt and to agree that those definitions shall be binding for the purpose of the agreements whatever the prevailing conceptions may be of those terms under other codes internally.

The answer of the authors to the question is therefore in the negative, and the Association has performed a useful service in producing this answer.

STATUTORY CONTROL OF AGRICULTURE IN THE UNITED STATES.

THE condition of agriculture is a matter of concern in all countries, and in particular it seems to receive a good deal of attention in the States of the United States. At the same time there is the tendency noticeable in other departments of life for the Federal Legislature to take a more direct concern, and State legislation has accordingly been necessary to put into local operation the plans of the Federal Government. The Digest of the legislation on agriculture during the years 1935–9 issued by the Library of Congress in their series of State Law Digests (No. 24, price 20 c.) covers a wide range, and it is impossible to deal with it in detail in the space available. From the various sections of the Digest, however, can be gathered a few points. In that which deals with publicity there is a law passed in Florida which meets the expenditure by imposing a tax on the fruits produced in that State. Washington goes a step farther with an enactment which creates a Commission to discover the health and food values of apples before advertising them.

Rural Rehabilitation.—The rural rehabilitation programme of the Federal Government was one of the most important in which the States participated, and the response was so considerable that a special division of the Executive had to be created in 1934 to deal with the work. "At first," the Digest records, "the State corporations acted as the agencies through which the Resettlement Administration carried on its activities, but a ruling from the office of the Comptroller-General decreed that funds made available under the Emergency Relief Appropriation Act of 1935 must be distributed from the United States Treasury and not through the State rural rehabilitation corporations. In order not to have two agencies carrying on the same type of work in each of the several States the corporations were asked to transfer the management and control of the corporations to the Resettlement Administration." This was effected by legislation in nine States.

Soil Conservation.—The difficult subject of soil conservation is brought within the sphere of agriculture, and in this again the central legislature took an active part. The Federal Act to promote the conservation and profitable use of agricultural land resources by temporary aid to farmers and by providing for a permanent policy of Federal aid to the States for such purposes, adopted February 29, 1936 (49 Stat. 1148), is an amendment to the Soil Erosion Act of 1935 and grew out of the invalidation by the United States Supreme Court (*United States* v. *Butler*, 297 U.S.1), on January 6, 1936, of the processing tax-benefit program of the Agricultural Adjustment Act of 1933. " The 1936 Act," the Digest explains, " places the emphasis on soil conservation and good farm management instead of on production control. It provides for temporary Federal aid in the form of grants paid directly to the farmers to enable them to adopt soil improvement methods, until January 1938, after which the grants would be available only in those states whose plans had been accepted by the United States Secretary of Agriculture. This time limit for temporary aid was extended to January 1942."

Grading of Products.—The grading of products involves a considerable amount of legislation. Potatoes appear to take the leading place in the number of States which have passed laws on the subject. Other vegetables, such as tomatoes, celery, brussels sprouts, asparagus, carrots and onions, have standard grades prescribed for them in different States. Eggs are the subject of legislation which follows on fairly uniform lines. The laws of fourteen States prohibit labelling eggs as " fresh " unless they meet the minimum requirements which are described in the words of the Digest as follows : " The air cell must be small in size, not more than two-eighths or one-fourth of an inch in depth, the yolk must have no noticeable defect, the white must be firm and clear and the germ must not show any visible development. A tolerance of two eggs in a dozen is allowed in wholesale lots of shell eggs which do not meet the minimum requirements. Weight requirements are also specified in these laws, and a statement of size must accompany all lots of eggs sold. Also all eggs must be sold by weight and size. Large, medium, small and pewee are the common size classifications, the net weight 24 ounces, 21 ounces, or 20 ounces for any dozen. Candling is the testing method used."

Co-operative Associations.—The value of co-operative associations in marketing is appreciated in a large number of States. The National Conference on Uniform State Laws adopted an agricultural co-operative marketing Act in 1936, and this has been followed by a number of States. The Uniform Law Commissioners state that " the Act is especially designed for producers of agricultural products, and membership in the associations is limited to such producers. It provides safeguards that it is thought will avoid abuses detrimental to the co-operative banks, rural electrification and other Federal agencies doing business with co-operative associations of farmers. The restrictions on dividends and doing business with

non-members conform to the provisions of the Federal statutes, exempting such co-operatives from income tax and anti-trust laws, and to what may be considered sound practices for non-profit corporations."

Plant Disease and Insect Pests.—The difficulties of the fight against plant disease and pests frequently necessitated a revision of the laws, and in some cases it is observed in the review that the States have found it necessary to pass an entirely new statute. Of a similar character are the enactments dealing with obnoxious weeds, in which financial assistance has been rendered from Federal funds.

Dairy Industry.—Finally may be noted the large mass of legislation dealing in some way with the dairy industry and dairy products. It is noted as being one of the major issues during the years under review. Publicity and advertising occupy an important place in order to encourage increased use and consumption of dairy products. Minnesota, in a law passed in 1939, goes so far as to require that a dairy slogan " drink more milk, eat more butter for your health and prosperity " is to be printed on all stationery used by the State and its political subdivisions. Wisconsin required in 1935 that butter and cheese should be served with all meals in hotels and restaurants. In 1939 a further step was taken in authorizing the Governor at his discretion to designate a day to be known as " Dairy Day."

To anyone who has occasion to be concerned with the promotion of legislation in any way relating to agriculture this Digest issued by the Library of Congress cannot fail to be suggestive.

C. E. A. B.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH.]

The Limits of Parliamentary Privilege.—The Report of the Committee of Privileges on the case of Captain Ramsay [1] marks another stage in the process of the most drastic limitation of the scope of privilege in so far as it applies to take a member of Parliament out of the operation of the ordinary law of the country. Captain Ramsay's detention was of a preventive character under Regulation 18B of the Defence (General) Regulations, 1939, and no criminal charge was involved. Naturally he rested a claim to freedom from arrest on the wide language used by Sir John Simon in the House of Commons on January 15, 1924,[2] when he committed himself to the view that the privilege of freedom from arrest extended not only to save from future arrest, but to discharge a member from detention, unless it was shown to the satisfaction of the House that he was detained on a charge of, or as a punishment for, treason or other indictable offence, a view for which the authority of Blackstone could be adduced. On the other hand, there fell to be set the declaration of the Commons in 1641 that " Privilege of Parliament is granted in regard to the service of the Commonwealth and is not to be used to the danger of the Commonwealth." Curiously enough the issue had never been determined. Members had been detained under Regulation 14B of the Defence of the Realm Regulations, 1914, the Restoration of Order in Ireland Regulations, 1920, and Regulation 23B under the Civil Authorities (Special Powers) Act, 1922, of Northern Ireland. No discussion took place regarding the cases under the Acts of 1914 and 1920, but Mr. Cahir Healy's detention in Northern Ireland was questioned in 1922, when Mr. Speaker Whitley—no doubt incorrectly—ruled summarily that the detention was not covered by privilege as being in a criminal matter ; in 1924, when Sir John Simon raised the issue, he merely ruled that the case was not one calling for immediate discussion by the Commons. In an older case under the Protection of Person and Property (Ireland) Act, 1881, the Speaker allowed the question of reference to a Select Committee —not the Committee of Privileges—to be debated, but reference was negatived. Mr. Gladstone[3] had contended that it was not desirable to set up privilege in such cases, when the Bill was in committee and an amendment to save privilege was proposed, and, though the refusal of

[1] H.C. Paper 164, 1939–40. [2] 169 H. C. Deb. 4 s., 66.
[3] 258 Hansard, 3 s., 1290 f.

the Commons to refer the detention of members under the Act does not definitely conclude the issue, it suggests that the House had no desire to claim privilege.

The case against privilege was strengthened by the fact that in regard to misdemeanours there had been no claim of privilege, even though the Gaming Act, 1744, appeared to imply that for offences under it, which were non-indictable, privilege would apply, unless expressly taken away. Further, privilege was denied as early as *Larke's* case for refusal to give surety of the peace, while the Commons on May 20, 1675, declared that privilege did not extend to breach of the peace—presumably covering all misdemeanours as technically breaches of the peace, and in 1763 both Houses denied privilege to writers and publishers of seditious libels. Detention under Suspension of Habeas Corpus Acts from 1715 to 1822 in case of members was made, by statute, subject to the assent of the Commons or Lords prior to commitment or detention ; the most natural deduction thence was that without such a proviso no privilege would have attached. It was, therefore, natural that the Committee should rule that Captain Ramsay's detention was not a breach of privilege. It had ascertained that it was in no degree motived by anything said by him in Parliament ; arrest in such a case would have been a clear breach. It recognized the theoretical danger that the Executive might evade Parliamentary criticism by interning all likely opponents, but it held that the decision *In re Lees* [1] afforded a measure of safeguard. This must be questioned ; a Ministry which was so oblivious of duty as to stifle criticism by interning members of Parliament would have scant difficulty in providing affidavits of the kind deemed satisfactory in that and other cases. It is clear that there is always danger in internment on suspicion, and that the courts give no security from misuse of the power, and the disadvantage to a constituency to be deprived of the services of its representative in the Commons is considerable. It may indeed be contended that it is desirable in the interests of the country, and to defeat any misuse of the power to intern as a means of stifling criticism, to provide that after, say, six months' internment a member shall be deemed to have vacated his seat, so that a fresh election can be held. The position is quite different from that in the case of Mr. R. Boothby, on whose conduct censure has been expressed, but who has declined to resign, for he is still available to aid his constituents in the normal way.[2]

Preventive Detention.—The Committee of Privileges refrained, of course, from any examination of the question of the propriety either in principle or in the special case of the detention of Captain Ramsay. But it appeared clearly from his statements that he was held in detention on the strength of the Secretary of State's reasonable cause to believe that he had been recently concerned in acts prejudicial to the public safety or the

[1] 57 T.L.R. 26, (C.A.) 68.

[2] See his defence in the Commons, January 28, 1941.

defence of the realm, or in the preparation or instigation of such acts, and that by reason thereof it was necessary to exercise control over him. Some eight weeks later he appeared before the Advisory Committee, but was not allowed to be represented by his solicitor, though particulars of his actions impugned were given. Later he was informed that the Committee had recommended the continuation of his detention, and that the Secretary of State had decided to do so. Further light on the procedure in such cases is shown by the case *In re Lees*,[1] which was heard both by a divisional court and by the Court of Appeal. Mr. Lees's detention was authorized under Regulation 18B, para. 1 (A), and rested on an order which stated that the Home Secretary had reasonable cause to believe that Mr. Lees had been or was a member of, or had been or was active in the furtherance of, an organization in respect of which the Home Secretary was satisfied that those in control of the organization had had associations with persons concerned in the government of a power with which his Majesty was at war, and that there was danger of the utilization of the organization for purposes prejudicial to the public safety, the defence of the realm, etc., and that it was necessary to exercise control over him. Mr. Lees was informed that he had expressed pro-Fascist views, but he denied that he had ever been a member of the British Union of Fascists ; so far from propagating anti-British views or hindering the country's war effort, he had been for some twenty-three years continuously in the service of the Crown, and, when arrested, was actually awaiting a ship to proceed to take up a new post in the Gold Coast colony. It is clear that Mr. Lees's detention was not based on very serious grounds, for the Advisory Committee recommended that he should not continue to be detained, and the Colonial Department does not appear to have made any objection to his continued employment in the service of the Crown.

But the case presented for him to the divisional court raised the vital question whether the process of detention was operated with due safeguards. The court conceded that it could inquire into the validity of the detention on Habeas Corpus, and therefore into the vital issue, whether the Home Secretary had reasonable cause for his belief. But how was the court to satisfy itself on this point ? It was claimed for Mr. Lees that the court should have placed before it the material on which the Home Secretary's belief was founded, so that it could decide whether there was reasonable cause for him to hold that belief. But the Solicitor-General urged that such information was necessarily confidential, and that its disclosure to the applicant and to the public, together with the names of informants, might be highly prejudicial to the interests of the State. The process of investigating whether restraint was proper was, as Lord Finlay[2] had said, quite unsuited for a court of law. On these arguments it must be remarked that restraint is as serious for many

[1] 57 T.L.R. 26, (C.A.) 68.
[2] *R.* v. *Halliday*, [1917] A.C. 260, at p. 269.

purposes to an innocent person as imprisonment as punishment would be ; that secret accusations run the danger of being devised by malice, and that the revealing of names might enable the accused person to disprove the allegations, and that trial *in camera* is a perfectly feasible process.

The divisional court thus took up the position that the indefinite incarceration of a British subject (if Captain Ramsay is to be believed, often in circumstances of considerable discomfort) is permissible, if the Home Secretary has reasonable cause to believe certain facts, and both it and the Court of Appeal agree that the court should be satisfied with an affidavit by the Home Secretary of the fact of his reasonable belief. In fact, of course, the Home Secretary cannot, without neglect of his more pressing duties, give real personal attention to each case of internment ; he must act on the advice of his expert officers, who are not merely fallible,[1] but whose immunity from criticism or judicial examination renders them liable to grave error. There is no doubt that the system might be gravely abused, and that serious errors must occur ; the only justification—whether sufficient is a matter of opinion—is the urgency of the danger, and the feeling that it is better that some should suffer unjustly rather than run danger for the State.

Freedom of Speech.—On January 22 the announcement was made of the application of Defence Regulation 2D to the daily paper, *Daily Worker*, and to a news-letter entitled the *Week*. It becomes, therefore, an offence to print, publish or distribute either of these papers, or any paper substituted therefor. The justification of this action is the fact that these papers have for months conducted propaganda intended to show that the war is being needlessly carried on as a selfish contest in the interests of a privileged class ; that Britain's allies are inspired by equally base motives ; and that the United States is assisting the allied cause, not for the purpose of defending freedom and democracy, but merely for the purpose of profiteering from every extension of the war. All other considerations have, in the view of the Government, been subordinated to the hope that the weakening of democratic institutions may provide an opportunity for the substitution of a Communist dictatorship. It is pointed out that since the end of September 1939, when the *Daily Worker* reversed its policy, which originally was one of support of the war, it refrained from publishing anything calculated to encourage co-operation in the struggle against Nazi and Fascist tyranny and aggression. The action taken has certainly not been precipitate. A warning was given in July 1940 to the *Daily Worker*, and the decision to suppress the paper was arrived at only after long persistence in the publication of matter well adapted to foment opposition to the national war effort.

In principle, of course, the suppression of propaganda tending towards the destruction of democratic government is wholly consistent with the fundamental principles of democracy. The doctrinaire opinion that democracy demands the toleration of the preaching of any view is wholly

[1] See, *e.g.*, *In re Sabini*, *The Times*, January 21, 1941.

incompatible with common sense and the national interest. For democracy to allow the propagation of views which aim at the destruction of democratic government and freedom of speech always involves some risk, and the destruction of democratic regimes in Europe has often been preceded by the undermining of democracy by propaganda, unwisely tolerated under the delusion that democratic principles forbid placing limits on freedom of speech. In Britain in time of peace a plausible case can be made for the widest freedom of political discussion, but in time of war limitation becomes wise, as soon as there is evidence that there is real danger of propaganda affecting injuriously the war effort of the country. Nor is the case for action diminished when the propaganda in question is animated by sympathy for the views of a foreign power whose attitude towards Britain and her allies is little removed from open hostility. The only element of doubt which presents itself in such a case is whether it would not be preferable to deal with such propaganda by judicial action rather than by executive decision. The view that urgent action was necessary, while legal proceedings might have taken some time, is open to the obvious objection that the undesirable propaganda had been carried on for months, and in any case a regulation could have been made to authorize executive suspension of publication pending trial. On the other hand, it can fairly be argued that it is not open to those who aim at the destruction of democracy and of all liberty of speech to complain that they are subjected to the same treatment by their adversaries in respect of liberty to propagate their views.[1]

A Diplomatic Innovation.—The selection of Lord Halifax to succeed Lord Lothian at Washington after the sudden death of that very successful envoy was accompanied by the announcement that, while of course he could not remain a full member of the War Cabinet, he would when in England take his place thereon for purposes of consultation. The plan is not unnatural in view of the extreme importance of the Washington Embassy under present conditions, and it will be remembered that before Mr. Eden's enforced resignation Lord Halifax had been in close touch with him, and had on occasion acted for him. There is also a certain parallel in the position held by Sir Charles Tupper when he was High Commissioner for Canada in London and at the same time remained a member of the Dominion Cabinet, a precedent followed by Sir G. Perley in the Great War, and for a short time by the present High Commissioner for the Commonwealth. A further innovation is the appointment of two ministers to aid the Ambassador in his task; Sir G. Campbell has been transferred from the representation of the United Kingdom at Ottawa, and prior to that post had been Consul-General at New York, giving him that thorough knowledge of the American character which Lord Lothian enjoyed but which Lord Halifax lacks. The vital importance of

[1] The case for his action was effectively argued on January 28, 1941, in the Commons by Mr. Morrison and by Mr. Lees-Smith. The case contra was put by Mr. A. Bevan, who dissociated himself from the policy of the paper.

Washington [1] in diplomacy is also attested by the representation there of Australia as well as Canada, the Union of South Africa and Eire.

Australia's External Relations.—The decision of Mr. Menzies to adopt the system of diplomatic representation for Australia has received effect in the exchange of envoys with Washington and with Tokio. As was natural, activity in urging an accord with Japan was manifested, and the part played by Australia in inducing the British violation of neutrality towards China, involved in closing for three months from July 18 the Burma road to China, was seemingly decisive. An important discrepancy in the presentation of the closure must be noted ; whereas Mr. Churchill announced it as intended to facilitate an accord between Japan and China—which, of course, was repudiated by China—Mr. McEwen stated that the interval was to be utilised for Anglo-Japanese discussions with a view to promoting a general settlement. It is clear that Australian diplomacy has failed to appreciate fully the fundamental incompatibility of Japanese policy with Australian interests, and the hostility of that policy to the Empire and to the United States. The episode illustrates the difficulty of co-ordinating Empire policy, and the tendency of units to place their own immediate interests in the forefront to the neglect of wider aspects. The fundamental character of Japanese policy has been far more clearly appreciated in Malaya and in the United States. But Mr. McEwen has also insisted that the appointment of a minister to Japan would in no sense alter the very closest co-operation with the Governments of the United Kingdom and the other Dominions with reference to all matters affecting foreign policy and especially Far Eastern policy. On the other hand, the appointment would secure more intimate and immediate information on Far Eastern matters. It must be noted that, in the absence of any closer relations with China, a pro-Japanese bias in Australian foreign policy may be promoted.[2] On the other hand, Australia has co-operated effectively with Britain in establishing commercial relations with the Free French administration in New Caledonia by the dispatch of a representative to Noumea, and in support of the Governments of the Netherlands Indies in the maintenance of the integrity of that territory. The union of New Guinea with Papua in a single military district evoked a violent accusation of breach of the mandate for that territory by Germany. It is clear that this accusation cannot be maintained, apart from any question as to the right of Germany to claim observation of the mandate. The arrangement made in no way runs counter to the terms of the mandate, which only forbids establishment of military or naval bases, a prohibition which has been duly observed. Another legal issue arising from the war is the question of the continued

[1] Canada has initiated diplomatic relations with Argentina and Bolivia.

[2] The Advisory War Council, representing the Government and the Labour party, on February 13 stressed the gravity of the crisis to Australia, to meet which it was consulting the Chiefs of Staff and the British Commander-in-Chief, Far East, an interesting constitutional innovation.

operation of the Italian treaty in respect of immigration. Concluded before the creation of the Commonwealth in respect of the colonies, now States,[1] it is admittedly in abeyance during hostilities, but the question is whether it is one of the type of treaties which in the absence of other provision automatically revive on the conclusion of peace. The sound view seems clearly to be that the treaty has been revoked by the outbreak of war, and, even without express mention, would not revive on the termination of the war. The question would not have arisen at all, had the treaty been concluded in the modern form with facultative determination for units of the Empire, but no such option was then asked for, and Italy consistently refused to agree to give it.

The Position of the Chief Justice.—The acceptance by Sir John Latham of the office of Minister Plenipotentiary to Japan raised a constitutional issue of importance. With a view to the maintenance of the impartiality of the judiciary the Judiciary Act, s. 8, provides that a justice of the High Court may not hold any other non-judicial office within the Commonwealth, and it would have been a mere technicality to plead that an office exercised in Japan was not within the prohibition. It was therefore felt desirable to make express provision for Sir J. Latham to act as Minister during the war and for not more than a year after. The Act was accepted, but it was pointed out that the principle was a dangerous one, and not to be taken as a precedent. A person having been appointed to the High Court should have " nothing to hope for and nothing to fear " from the Executive, and this principle was being violated. The same criticism was made when Sir Isaac Isaacs was induced to surrender office in order to accept, despite his great age, the position of Governor-General of the Commonwealth ; in that case there was the added objection that the vacancy was brought about in order to enable the Labour Ministry of the day to add a protégé of their own to the High Court. The retirement of Mr. Justice Evatt to assume a political career illustrates the difficulties of the position. It is impossible to expect a justice who retires in these circumstances to escape criticism, and, however great the hardship to individuals, it seems clear that it is in the interest of the repute in which justice is held that judges should, once they accept preferment to the bench, make that their definitive career. No doubt in Sir John Latham's case there were special circumstances rendering his selection certain to be acceptable to Japan, but it may be doubted whether they were of such importance as to endanger an important principle. There is obviously, it must be added, considerable objection to depriving the High Court for a considerable period of the guidance of the Chief Justice, even if the senior justice is given during his absence the style of Acting Chief Justice.

War Powers to deal with Industrial Disputes.—The necessity for the maintenance of the impartiality of the High Court is the more important because of the natural pressure during wartime on the delicate balance

[1] Keith, *Responsible Government in the Dominions*, ii, 848 f.

of the constitution. By regulations under the National Security Act, 1939, the Commonwealth Government has sought to decide for the period of the war the long-discussed problem of the power of the Commonwealth Court of Conciliation and Arbitration to deal with intra-State, and not merely with inter-State, industrial disputes. It is a striking step to take; in 1911 and subsequently efforts to secure a constitutional amendment in order to expand the powers of the Commonwealth definitely failed, and *a priori* it seems to be straining war conditions too much to deem them to justify the wholesale invasion of the rights of the States. The regulations also dispense with formalities likely to delay the determination of disputes, and empower the court to make its award a common rule for the industry concerned, instead of limiting its application to employers and members of the trade unions cited, as has been the normal practice hitherto. These are dangerous powers, but the States have no protection against such encroachments on their powers other than the decisions of the High Court, which of late, partly as the result of the efforts of Labour appointees, has shown a very definite tendency to interpret the authority of the Commonwealth in a very generous manner. It must be noted that the High Court showed itself generous also in the Great War,[1] and negatived efforts to apply restrictions which it would probably have insisted on in peace; and it must not be forgotten that, while the Privy Council has in peace restricted very definitely the powers of the Canadian Parliament to regulate trading in the Provinces, it permitted regulation of the cost of newsprint as a war measure.

The New Zealand War Cabinet.—While Australia has been unable to secure a War Cabinet representing the Government and the Opposition, and there the War Cabinet is merely the aspect of the Cabinet which deals with war issues, in New Zealand a curious plan has been adopted under which a War Cabinet has been created, consisting of three members of the Government and two of the Opposition. Its aim is to control and unify action in carrying on the war with the fullest effect. The normal Cabinet and Ministers will continue to function with their usual responsibility. Any action which may be necessary to secure the carrying out of the decisions of the War Cabinet will be taken by the Prime Minister in virtue of his constitutional responsibility. The advantage to the Government is that, in matters not involved essentially in the war effort, it can maintain and extend its socialistic plans without risking the compromises necessitated by a coalition, while it can enlist the aid and guidance of the Opposition. There continues to function a War Council with advisory functions, which includes leading Ministers with representatives of employers, workers, farmers, the Maoris and returned soldiers. It had been suggested that Opposition members might have served on this body, but it was pointed out that they would not thus have any effective part in directing war policy.

Censorship of Parliamentary Broadcasts.—The New Zealand Parlia-

[1] Keith, *The Dominions as Sovereign States*, p. 516.

ment possesses the rare distinction of having had its debates broadcast for some years. This created a rather delicate point when war broke out. Naturally there was much reluctance to sacrifice a practice which, to the credit of New Zealand, has proved profitable and acceptable. But, obviously, as the Prime Minister asserted in the heat of debate, no member—certainly not himself—could guarantee the avoidance of disclosures of facts which might be of service to the enemy. It has accordingly been agreed by the Government and Opposition to entrust to the Speaker the duty of putting a speaker off the air whenever he deems his remarks dangerous, and care will be taken to secure that the matter in question will not be allowed to appear in *Hansard*. The Prime Minister felicitously exemplified the dangers of leakage of information through indiscretion ; in a religious service on the occasion of the departure of the first echelon of the New Zealand Overseas Force hymns had been included which would have revealed to the enemy, as they did to people in Fiji and other Pacific islands, the sailing of the troops.

The Military Prerogative.—The difficulty of establishing any contract between a subject and the Crown arising out of military service is evidenced by *J. S. Rankin* v. *The King* [1] decided by the Exchequer Court of Canada. Colonel Rankin, who was in the reserve Militia, was appointed Junior Departmental Solicitor in the Defence Department, and later in 1930 was by Order in Council given the duties of Deputy Judge Advocate-General. As, for reasons unknown, the Minister declined to accept official recommendations for increase of his emoluments, despite the additional work entailed on him, he sought by petition of right to establish a claim as colonel for the period when working as D.J.A.G., claiming that the appointment was essentially military, and could not have been conferred as a civil office. But though that proposition could not be denied, the court found it necessary to rule that a mere appointment to a military office by the Crown conveyed no right to a salary unless clear provision was made to that effect. Any derogation from the prerogative must, under the Interpretation Act, be explicit, and, if payment were to be due, it must appear that the amount should have been decided under the authority of the Governor in Council. If it had been so decided, seemingly it might have been recovered by petition, but the point did not arise for decision.

Price-fixing by the Provinces of Canada.—In *Home Oil Distributors Ltd.* v. *A.-G. of British Columbia* [2] the validity of the Coal and Petroleum Products Act of the Province was challenged. The Act conferred on a Board the power to decide at what prices, wholesale or retail, coal and other products might be sold for use in the Province. The Act was *prima facie* merely legislation to regulate business in the Province, but an effort was made to invalidate it by showing that the Legislature had acted as the result of a report by a commissioner which showed that Californian exporters injured the trade of the Province by selling fuel oil at a rate

[1] [1940] Ex.C.R. 105.

[2] [1940] S.C.R. 444.

injurious to the coal mines of the Province, but recouping themselves for losses of profit thereon by charging very high for gasolene, in which the Province could not compete. The legislature therefore allowed the Board to fix an arbitrary maximum for gasolene and a minimum for fuel oil. Davis J. pointed out that to interpret legislation by reference to the report of a Royal Commission was open to grave objection, as was laid down in *Assam Railways* v. *Inland Revenue Commrs.*[1] and in *Gorham's Case.*[2] The task of judges was to interpret the law without regard to conjectures as to its motive, and the Act was, so regarded, amply covered by the rule in *Shannon* v. *Lower Mainland Dairy Products Board.*[3] In the circumstances it became unnecessary to pass judgment on a rather curious movement by the legislature ; before the case went to trial, by an amendment of the main Act it was laid down that that Act was not to be deemed to have been intended to give effect to the Commission's report, and in construing the Act no reference was to be made to the report. It may safely be said that a legislature cannot deny access to the courts to a citizen desirous of testing the constitutionality of an Act, nor can it refuse access to the relevant evidence by the process of denying relevance. In general it is patent that attempts by legislation to interfere in matters under judicial consideration are undesirable.[4]

Appeal from Habeas Corpus Proceedings.—The Supreme Court of Canada is excluded from jurisdiction in appeal in criminal causes and in proceedings on writs of Habeas Corpus arising out of a criminal charge. In *Trenholm* v. *A.-G. of Ontario*[5] the issue arose from an arrest on a criminal charge, followed by remand to gaol. After the term of the remand had expired, an order of the Lieutenant-Governor was issued authorizing the detention of the person concerned in a mental hospital. The action, whether taken under the Mental Hospitals Act or the Criminal Code, was invalid, as in either case action was conditional on his being at least under remand. But neither the court below nor the Ontario Court of Appeal would release him on Habeas Corpus, and before the Supreme Court it was strenuously contended that no appeal lay, as the proceedings arose out of a criminal charge. The majority of the Supreme Court found it possible to overrule that contention by the consideration that the expiry of the remand ended the criminal charge, and all that remained was an ordinary case of Habeas Corpus based on an illegal detention. Though the decision is in accord with substantial justice, Crocket and Rinfret JJ. dissented on the broad ground that the court was being in effect asked to do precisely what it was forbidden to do, namely to entertain an appeal in Habeas Corpus which in fact rose out of a criminal charge.

The Hovering Act.—In *John M. Fudge* v. *The King*[6] interesting points were raised before the Exchequer Court of Canada, arising out of a case

[1] [1935] A.C. 445. [2] Moore, 1852 ed., p. 462. [3] [1938] A.C. 708.
[4] *Performing Right Society Ltd.* v. *Bray Urban District Council*, [1930] A.C. 377.
[5] [1940] S.C.R. 301. [6] [1940] Ex.C.R. 187.

of the not rare practice of smuggling liquor into Prince Edward Island, whose geographical position affords obvious facilities for this pastime. Canada has in her Customs Act legitimately extended the area of her customs water to extend nine marine miles beyond the normal three-mile limit of territorial waters. But this extension primarily affects only vessels registered in Canada or unregistered vessels owned by persons resident or domiciled in Canada. Power to extend the application of the principle exists, and would clearly be legal even internationally.[1] But even Newfoundland ships have not yet been brought within the terms of the Act, and this fact rendered a careful weighing of evidence regarding the allegation that the *Geneva Ethel*, a Newfoundland vessel, had been actually within the three-mile limit. There was a discrepancy of testimony, but the court ruled that the revenue cutter which seized the ship had modern nautical instruments which gave much greater accuracy to the testimony of the officers thereof than could be ascribed to the mere memory of the master of the *Geneva Ethel*. It also accepted Admiralty charts as available in evidence, and admitted further the Light List Book produced by the Transport Department in 1937, on the ground that it had been produced by officers of the Government who might be presumed to have given correctly the height of the lighthouses of the Dominion. There arose then the question whether the ship had been hovering, or had, while lawfully fishing, moved inside the three-mile zone by error, so that it might properly be held that she had merely availed herself of the right of innocent passage. It was ruled that the possession of liquor and cigarettes on board and the actual movements of the vessel ruled out this explanation. There remained, therefore, only the point that, though the vessel had certainly been in territorial waters, the actual seizure took place on the high sea, whither the master had taken his ship on the beginning of pursuit. Here again it was ruled that the capture was valid under the doctrine of hot pursuit, as set out for Canada in the well-known case *The Ship North*.[2] The validity of the seizure seems patent, and the episode may be deemed to afford a ground for the application to ships registered in Newfoundland of the rules regarding Canadian customs. The close connexion between the Dominion and the island during the war, when Canada has provided troops to safeguard Newfoundland, would doubtless cause the administration to accept readily the application to ships there registered of a measure intended to defeat the unsocial evil of smuggling.

Jurisdiction in Religious Issues.—In *The Ukrainian Greek Orthodox Church of Canada* v. *Trustees of the Cathedral of St. Mary and Peter Mayewsky*[3] the Supreme Court was confronted with a very complex issue. Mayewsky was a priest of the cathedral, and in 1937 was tried by a church court for acts of ecclesiastical disobedience. He was condemned, and duly declared by the archbishop, as bishop of the Orthodox Church,

[1] *Croft* v. *Dunphy*, [1933] A.C. 156.
[2] [1906] 37 S.C.R. 385.
[3] [1940] S.C.R. 586.

to be excluded from priesthood and membership. But the cathedral continued to avail itself of the services of Mayewsky, and efforts were made to induce the courts to issue an injunction forbidding the priest to officiate and the cathedral trustees to employ him, and to order him to return a sacred object, the antimins worn as a ceremonial dress. Mayewsky counterclaimed a declaration that he was in good standing, that the attempt to expel was void, and for damages. It soon appeared that the proceedings could not be sustained on the essential ground of the inability of the church to bring in any valid patrimonial interest. In no way did he derive his emoluments from the church, and it reduced itself to a mere matter of ecclesiastical dispute, which the courts would not deal with in any way. The only point which caused difficulty was the question of the antimins. Crocket J. put the point against allowing the demand for return in the most convincing way ; the article having no monetary value, the aim of the claim was to enforce a purely ecclesiastical decree or sentence, which the court should not assist. Davis and Hudson JJ. on this head held that surrender of the antimins was proper, but otherwise agreed that no enforcement of the decree could be accorded.

Declaratory Judgments in Eire.—An interesting decision regarding the right to declare obligations of the State in instances where a decree for money against the State cannot be made is that of Gavan Duffy J. in *Maunsell* v. *Minister of Education and Breen.*[1] In his view it had been established that for some two years a teacher had been deprived of pay as the result of a genuine, but erroneous, impression of the Education Department that it had lawfully decided to discontinue his pay. It was, however, denied that he could properly give any relief to the plaintiff, since no legal right had been violated, since he was suing for payment out of public funds without joining the Ministry of Finance, since the executive could not bind itself by a promise to pay, since the rules were not a rigid code but merely a general indication of the manner in which the authority exercised its discretionary powers, and because any agreement was with the school manager, not the teacher. But he held that even in England, despite procedural difficulties in claims against the Crown, a declaration of right might be possible. That proposition must be doubted ; it is by no means adequately supported by *Eastern Trust Co.* v. *Mc Kenzie*[2] and *China Mutual Navigation Co.* v. *Maclay.*[3] No doubt the State need not necessarily be deemed to have inherited the full privileges of the Crown ; it is the view of Gavan Duffy J. that it has not, and, if this is so, it is easy enough to hold that a court of unlimited jurisdiction is entitled to give a declaratory judgment against a department of State in respect of its failure properly to interpret a regulation which it is its statutory duty under Art. 56, clause 3, of the Constitution of 1937 to administer. To deny redress to a person aggrieved by an error in the exercise of a statutory

[1] [1940] I.R. 213.
[2] [1915] A.C. 750, at pp. 759, 760.
[3] [1918] 1 K.B. 33, at p. 41. But see *Bombay and Persia Steam Navigation Co.* v. *Maclay*, [1920] 3 K.B. 402.

duty was improper ; if it had been necessary, he would have reached the same result on the basis of implied contract. On the other hand, it must be pointed out that a decree for payment could not be made in the absence of proof that the necessary sum was covered by an Appropriation Act. But in his view the fact that such an order was impossible was no ground for not making a declaration that the pay of the teacher had been withheld in error. Presumably the department would take whatever action might be proper to put matters right. It may be objected that in the absence of an Appropriation Act covering the sum there was no basis for any decision, and the extension of such judgments might be inadvisable.[1]

[1] Cf. Keith, *The Dominions as Sovereign States*, pp. 353, 571.

NOTES.

Addresses of Dr. Nicholas Murray Butler.—It is rarely that a public man can republish a series of addresses after a period of more than thirty years without a single word of alteration. That, however, is the record attained by three addresses delivered by Dr. Nicholas Murray Butler. The first was before the National Education Association at Buffalo, New York, on July 7, 1896, and dealt with democracy and education. The second, delivered on June 22, 1899, Commencement Day, to the University of Michigan, was on the subject of education of public opinion, and the third, which was a Charter Day Address to the University of California, on March 23, 1907, provides the key-note to the volume which is entitled *True and False Democracy* (New York : Charles Scribner's Sons). The fact that the wise thoughts embodied in these discourses have remained of practical value and application for more than a generation demonstrates to some extent the scope of the contribution made by the widely respected orator to the national life of the United States. In a remarkable degree they are of value under present-day conditions and cannot fail to make their contribution to a sound judgment in defining the course to be pursued by the United States in the present international situation. Moreover, these addresses provide guidance for the future. Whatever may be the international settlement there can be little doubt but that the problems connected with labour will hold for all the countries of the world a prominent position in national conditions. Accordingly a passage may be quoted from Dr. Nicholas Murray Butler's address on " True and False Democracy," which defines the fundamental conception of labour to be maintained as an ideal in all such deliberations. Dealing with those wreckers of society who stimulate human passion by endeavouring to establish a false conception of the contribution of one section of the community to the welfare of the whole, he goes on to say :

> They begin by playing upon the term " labor." Taking note of the fact that the world's workers constitute all but an insignificant remnant of the world's citizenship, they would set one form of labor against another, and confuse and confound the meaning of the term " labor " itself. All the world over, these mischief-makers, when they put forth an academic theory, use the term " labor " in a way to include every form of productive activity. For that purpose the inventor, the overseer, the manager, the guide, and inspirer of an undertaking, is a laborer ; but when from the height of academic theory they come down to the plane of popular agitation, then they make the term " labor " apply to manual labor alone. It is true that leading economic

writers themselves are responsible for the widespread confusion between these two uses of the term "labor." As a matter of fact, ordinary manual labor is just the opposite of what the socialist supposes it to be. Instead of being the sole instrument in the production of wealth, as the modern world knows wealth, it is a subordinate element in that production. Manual labor is always essential, to be sure, but manual labor alone does not now produce, nor has it ever produced, much more than a mere minimum of subsistence. All of the increment in production which has made the modern world possible is due to the directing faculty, to the capacity to organize, to manage, and to apply. These powers and capacities operate both through labor and through capital. Therefore, to attempt to substitute the mob for the people, manual labor for labor in all its forms, and economic equality for liberty, is to destroy all those institutions and accomplishments upon which man's progress has rested for three thousand years, and which man's progress during that period has developed and applied in so astounding a fashion.

The sober and restrained thought embodied in these addresses makes them welcome to a much wider audience than those to whom they were originally delivered, and many outside the United States will profit by a careful perusal which will provide fundamental principles for action.

The Work of the Society.—Several kind expressions of sympathy with the difficulties of the society have been received, and the committee are sincerely grateful for them. In particular reference may be made to a most friendly communication from the treasurer of the American Bar Association, Mr. John H. Voorhees, who wrote :

It has been deemed appropriate that, in this hour of stress in the British Isles, the American Bar Association should take this means of signifying the firmness of our ancient friendship, the sympathy of the American Bar and the American people for Great Britain in the troublous times that have now descended upon her, and confidence that the outcome of the conflict now raging will be the survival of those principles of liberty that are the steadfast ideal of both your Bar and ours.

Among others who have expressed their willingness to co-operate more closely in the work of the Society may be mentioned the American Law Institute from whose president, Mr. George Wharton Pepper, a letter was received which concluded by saying :

Permit me in closing to express to you the admiration with which all of us on this side of the water are contemplating your heroic defence of the liberties which are our common heritage.

Crisis Legislation.—*The Columbia Law Review* for December of last year contains an article by Sir Cecil Carr on "Crisis Legislation in Britain" following a lecture upon the subject delivered by him at Columbia University in the preceding October. We are glad indeed to know that Sir Cecil has returned safely home again, notwithstanding a dangerous episode on the voyage, and offer our congratulations upon the honour conferred upon him by Columbia. It is not to be expected that an

article upon British legislation written for an American journal should follow precisely the lines of exposition most illuminating to the English lawyer, but whatever Sir Cecil writes is of value, more particularly upon a subject which his studies and occupation have made so definitely his own. The bewilderment of the average man as to what he may or must do is, so far as my experience goes, profound and I have listened on long night vigils to many confused and sometimes acrid arguments as to torches, motor lights, black-out precautions and the like which showed that the presumption that we all know the law was never farther from the truth than with respect to emergency regulations.

Sir Cecil in his preliminary observations refers to the relation between the ancient prerogative and the modern statutory crisis legislation. There is probably a growing number of people who regret the loss or limitation of royal prerogative. The suspicion which in old days of conflict attached to it has departed, and its extreme value in emergency has not infrequently been proved. Nobody doubts that the House of Lords would have long since ceased to exist had the royal prerogatives in the creation of peers been limited as was once desired. Many deplore that the decision in the Wensleydale case obstructed the exercise of a prerogative which might have been so beneficial in its results. The traditional distrust of the prerogatives, persisting into a new era, had possibly a late repercussion in contributing to the decision in the De Keyser Hotel case.

In the body of his article Sir Cecil gives a general account of the principal heads of " Crisis " legislation and the safeguards, such as they are, against abuse. That a democratic community, accustomed to free discussion, resenting arbitrary authority and maintaining its " rights " with a noisy insistence, is yet so ready, on the whole, to trust and obey to the utmost when the need arises, seems to show that democracy is not incompatible with public liberty and common sense as is sometimes suggested.

F. M. G.

Survey of English Law.[1]—It is a testimony to the zeal and energy of the members of the Department of Law and International Studies at the London School of Economics that the *Survey of English Law* has been published on its usual scale. As the series lengthens the value of the book as a constant source of reference becomes increasingly apparent. The present issue naturally is obliged to devote a good deal of attention to emergency legislation, which occupies a long section of forty-seven pages. The preliminary survey notes, however, that the bulk of the space is devoted as usual to case law. In this connexion it is worth while to raise the question whether the *Survey* might develop its value to ordinary people through the contacts which the School of Economics has with the business community. The case of *Marrison* v. *Bell* provides an

[1] *Annual Survey of English Law*, 1939. London School of Economics and Political Science. (London : Sweet & Maxwell, Ltd.) Pp. xxxvi + 439. 10*s*. 6*d*.

example to illustrate the point. It was a decision which affects every employer of labour and everyone employed, and did in fact cause a considerable amount of perturbation to many people. Apparently the learned contributor of the section on Industrial Law still considers that it is of considerable value, though later decisions have whittled down its effect, and in everyday life it has ceased practically to be taken into account. The main difficulty would seem to have been that a legal argument was conducted apart from the facts to which it must be applied. Nevertheless the reporter could hardly be blamed for having reported it, and the *Law Quarterly Review* would seem to be justified in its protest against the observations of MacKinnon L.J., though curiously enough its comments on the subject wind up by criticizing the reporter for the inclusion of another case on the subject in the Law Reports. The main objection really is that a case like *Marrison* v. *Bell* comes before the court without a full presentment of the customs and practices relating to the facts. There is accordingly a risk that a decision, quite unintentionally, will upset relations between employers and employed which have been not only legal but entirely happy. It is most important to avoid anything of the kind, and it may well be that the London School of Economics could make not only useful but even a valuable contribution in mitigating the effect. The editor of the *Canadian Bar Review* (January 1941) has something to say on the subject in an article "concerning lawyers" in which he discusses their loss of influence, as he considers, in public life in Canada as well as in the United States. He supports Dean Green, of the North Western University School of Law, in thinking that lawyers have concentrated too much upon the past without making themselves masters of the life about them which demands different methods of control. Another section of the *Survey* which at any time has a particular value has become increasingly so under war conditions, and that is the guide which is provided to the legal literature published during the year. It may be hoped that Professor Parry and his colleagues will be able to continue this publication in spite of all difficulties. C. E. A. B.

The Organization of Government.—It would be easy to underestimate the influence on political thought of Montesquieu's *Esprit des Lois* (1748). In Book XI, which was inspired by the British constitution and which (in the words of Sainte-Beuve) "*a eu l'influence la plus profonde sur la société moderne en général*," the author propounded his famous doctrine of the separation of powers (legislative, executive and judicial) as the foundation of freedom. This principle, which Blackstone incorporated in his Commentaries as the condition of "public liberty," came to be regarded by the North American colonies as the guaranty of their newly won freedom and was made the corner-stone of the 1787 federal constitution. In France it was responsible, in its most intransigent form, for the unworkable constitution of 1791, and it has coloured French political thought ever since, not always with happy results.

Under the title " The Organization of Governance," the *Chinese Social and Political Science Review* for April-June 1940 publishes an article by Mr. H. C. E. Zacharias, of the Catholic University, Peking, in which the author examines the division of the labour of government and the assignment of different functions to separate organs. He disputes the value of Montesquieu's doctrine regarding the separation of powers. " To one who has never come under the spell of either the French or the American political tradition it is difficult to see in it anything but a fetish." Clearly, the complete disjunction of the three organs of government would inevitably lead to insoluble deadlocks, since, as J. S. Mill pointed out in his *Representative Government*, each department acting in defence of its own powers would never lend its aid to the others, and the consequent loss in efficiency would outweigh all the possible advantages arising from their independence. But it must be borne in mind that if the doctrinaire French constitution of 1791 proved unworkable, the more flexible application of Montesquieu's principle by American political thinkers has been a success.

The greater part of Mr. Zacharias' article, however, is taken up by a study of what he calls " the vertical organization of government," *i.e.* the distribution of powers among a series of hierarchized governments. This, he writes, can be effected in a twofold manner, *i.e.* on a territorial (or regional) and on a personal (or functional) basis, each method offering again two possible solutions : the first, either by devolution or by federation ; the second, either along cultural or along professional lines. The survey covers a wide field and includes an historical retrospect, and the author must be congratulated on this condensation in very readable form of so much historical, legal and political lore. His treatment of Corporatism, the much-advertised nostrum of our time, deserves special mention. Mr. Zacharias is in obvious sympathy with the views expressed by Pope Pius XI in the encyclical *Quadragesimo Anno* (1931) that social life has entirely lost its organic form, that a variety of once flourishing associations have been destroyed to the detriment of the State which has been submerged and overwhelmed by the occupations and duties once borne by these associations, and that the aim of social policy must be the re-establishment of vocational groups. The corporative order advocated by Mr. Zacharias, however, is not that of the Fascist regime, which " is not so much one of corporations as of incorporation of everything in the State," but that evolved by Portugal under Dr. Salazar's guidance. The Portuguese Corporative Chamber has to appreciate the different aspects of problems, and to that extent the particular interest is to be heard, but the decision lies with the National Assembly representing the national interest. " Those foreign observers, therefore, are mistaken who in their own exaggerated enthusiasm for the corporative order believe that once the corporate organization of the country is fully developed, the Corporative Chamber will become the chief, if not the only, legislative body."

One may not always agree with Mr. Zacharias, but there can be no

question about his having written an instructive and stimulating article. What conclusion can be drawn from it ? Possibly Montesquieu's : "*Les hommes s'accommodent presque toujours mieux des milieux que des extrémités.*"

M. F. P. HERCHENRODER.

Free Gifts Shopping Schemes.—War conditions in Great Britain have led to a number of attempts by greengrocers and others to exploit the scarcity of certain articles. One customer was told that she could have oranges only if she bought something else. The greengrocer justified this by stating that the wholesaler had made as a condition on the sale of a case of oranges the purchase of four or five bags of carrots. The magistrate imposed a fine for wrongfully attaching a condition to the sale of food, and similar action has been taken in respect to lemons and onions. This is the variant of a practice adopted from time to time, though not often in Great Britain, to further the sale of an article by offering some gift as an inducement. In the United States, however, it is in operation on a large scale and many of the States have special legislation dealing with it. Mr. John Wolff, of Columbia University, surveys these laws in an article on " Sales Promotion by Premiums as a Competitive Practice " in the *Columbia Law Review*, November 1940. He quotes a recent estimate that one billion dollars' worth of premiums are annually given away in some form to the American consumer. The immediate basis of Mr. Wolff's article is a decision by the Supreme Court of Michigan (*People* v. *Victor*, (1939) 287 Mich. 506) by a majority of the judges that the giving of premiums was a legitimate trade practice which could not be prohibited by the Legislature under the Police Powers. The history of this litigation now goes back for sixty years and the solution of the difficulty is becoming more complex in course of time. The courts in the different States have decided without any uniformity, although the majority have held that the enactments were unconstitutional. It was not until 1916, when the Supreme Court of the United States upheld anti-premium statutes of the States of Washington and Florida, that the supporters of this legislation secured substantial authority. Unfortunately, however, the State courts have not followed the United States Supreme Court, and the recent decision of the Michigan court is the latest to differ from it.

The form in which the premiums have been offered has varied and increased in its scope. The premium, as it is described, is in many instances delivered with the article purchased. The Michigan statute is directed against this by making it unlawful to give away " any commodity in this way." The constitutional issue turns upon whether this practice is embraced within the Police Power of the State to promote the public health, morals, safety and welfare. It is under the last provision that the point is contested, since the question is whether a prohibition of premiums may promote the public welfare. Mr. Wolff surveys a long catena of decisions from this point of view and finally comes to a conclusion in favour of the constitutionality of anti-premium statutes. He does not

consider that there is any answer in saying that these statutes will do more harm than good by inflicting serious injury on premium manufacturers, premium givers and those employed by them. His contention is that the courts are concerned with the power of the Legislature and not with its wisdom.

In conclusion he cites in support of his argument the experience of other countries. " In the course of the last 15 or 20 years anti-premium statutes have been enacted in Belgium, Denmark, Danzig, Luxembourg, Italy, Germany, Lithuania, Esthonia, Latvia, Norway, Sweden, Czechoslovakia, Austria, Jugoslavia. A commission formed by the International League for the Suppression of Unfair Competition to study the premium problem has unanimously condemned this method of sales promotion." He submits that the arguments of this league and the evidence adduced by it have a substantial bearing on the question whether American anti-premium statutes are so arbitrary and capricious as to violate fundamental law. The fact that the practice has developed so considerably in spite of legislative prohibition suggests that the legislation is in advance of public opinion and that the work of the league might be usefully devoted to its education.

The International Labour Office.—Mr. J. G. Winant, until recently the Director of the International Labour Office, and now United States Ambassador to this country, announced that its work is being continued in Montreal, as countries at war and at peace are drawn together in the I.L.O. He points out that to-day the defence of every country rests ultimately upon the strength of its social structure. In particular all the countries are concerned with the relationship of the people and the governments to labour, which is specially embodied in the objective of the organization " to assure employment and to realize a greater degree of social security for the men and women of all countries."

The invitation of the Canadian Government to transfer the office temporarily to Canada, as Geneva was practically isolated from the great majority of its member countries, was particularly welcome, as Canada has been a strong supporter of the International Labour Organization since its foundation over twenty years ago, and has maintained a permanent office in Geneva to facilitate co-operation with its work.

Hours of Work in Wartime.—Experience in this war has already confirmed that which was obtained during the war of 1914–18 that prolongation of working hours has to be regulated carefully in order to avoid defeating its object. The International Labour Review has collected (*Review*, Oct.–Nov. 1940, p. 267) a note of the action taken in various countries. The Canadian Government, by a minute of June 20, 1940, laid down " that where increased output is desired it should be secured as far as practicable by the adoption of additional shifts throughout the week " rather than by unduly extended hours of work.

The German Government has been dealing with the subject from time to time, and on September 1, 1939, measures were introduced which had the effect of almost entirely abrogating the restrictions on the hours of work of adult male workers and of abolishing increased pay for overtime. The results, however, within quite a short time led to a partial return to the pre-war standard, and by an order dated December 12, 1939, the normal working day was fixed at ten hours as a general rule and twelve hours for work regularly involving considerable periods of mere attendance. The general principle was to maintain the eight-hour day as far as possible. The order went on to say, "even if output has to be increased exaggerated demands must not be made on the workers. . . . Excessive hours of work must be prevented."

In Great Britain the special effort made to work for seven days a week soon had to be relaxed, as it was found to cause a rapid decrease in individual productivity owing to the abnormal strain. The Ministry of Labour accordingly issued, on July 23, 1940, general directions for the guidance of employers so as to avoid a strain on the workpeople while maintaining the maximum output necessary for the national supplies. The enforcement of the law rather than its text, as the International Labour Office have always emphasized, is the real test, and war conditions make this particularly difficult. A summons for working boys longer than the law allows was dismissed by the magistrate on the ground that such prosecutions are likely to impair the war effort.

In Japan the conflict with China has involved exceptional difficulties and required an entirely new departure by the Government. It was found that unduly long hours of work had led to a considerable increase in the numbers of fires in factories in the Tokyo area which were attributed to the excessive fatigue of the workers. In addition, there was a rise in statistics of sickness, accidents and absence from work. Accordingly on May 13, 1939, the first legal restriction on the hours of work of adult male workers other than those employed in underground work in mines was laid down in an order fixing the maximum hours in principle at twelve a day including pauses. In the United States the working hours were the subject of legislation in the Fair Labour Standards Act of 1940. Although the requirements of national defence were fully recognized, it was not thought necessary as a general rule to extend the hours beyond forty a week. The National Defence Advisory Commission, however, added "in emergencies or where the needs of the national defence cannot otherwise be met, exception to this standard should be permitted. When the requirements of the defence programme make it necessary to work in excess of these hours, or where work is required on Saturdays, Sundays or holidays, overtime should be paid in accordance with the local recognized practices." The important factor in this decision was that there was a number of unemployed workers to be absorbed into industry, so there was not the same justification as in other countries for the extension of hours of those already in employment.

Decree Rule in France.—The delegation by the French Parliament of its legislative powers to the Executive—an expedient which had been discussed but was not adopted during the Great War (1914–18)—became, strangely enough, a normal feature of French political life in the post-war period. Recurrent financial and currency difficulties partly account for this paradox. Senators and deputies were reluctant to incur the odium of being too closely associated with unpopular measures which the public good required: they preferred to leave the thankless task of framing and enacting these to the Cabinet. How far this delegation of functions was constitutional under the organic laws of 1875 remained largely an academic question, since the French courts declined to examine the constitutionality of laws. But legislation by executive decree undoubtedly undermined France's political structure and paved the way for Marshal Pétain's authoritarian regime in the darkest hour of her history.

In an article entitled "Decree Powers and Constitutional Law in France under the Third Republic" in the *American Political Science Review*, December 1940, Mr. Otto Kirchheimer, of the Institute of Social Research, New York City, describes the transition from limited enabling statutes to Daladier's enabling Act of December 8, 1939, which authorized the Government in urgent cases "to take by decree adopted by the Council of Ministers all measures imposed by the exigencies of national defence." He observes that this Act resembles rather closely the ill-fated emergency powers of Art. 48 of the Weimar Constitution, in that the Government was now at liberty to issue decrees not only without being specifically empowered to do so, but also without the hindrance of the rather narrow time limits usual with enabling Acts.

> In fact, from 1934 we can trace a gradual eclipse of parliamentary legislation which becomes increasingly marked as the years go on. In 1926, Government decrees were still confined to narrowly limited fields, and even the Doumergue and Laval emergency powers were tied to concrete objectives in intent, although tending in fact towards all-embracing objectives. Daladier's régime marks the completion of this change. The objectives to be attained by decree procedure became a secondary consideration. Decree powers are required as the process of parliamentary legislation is declared incapable of withstanding the competition of Fascism's unrestricted governmental action.

Mr. Kirchheimer's article is valuable not only on account of its wealth of documentation but because it contains a very shrewd diagnosis of what was fundamentally unsound in the French regime of decree-rule, viz. the growing inability of minorities to fight or even discuss the Government's policy. "In sum, the theory that decree government represents 'parliamentary government in our time' simply ignores the problem of the groups not represented in this government." The article was written before the French collapse, but in a footnote the author sounds a note of warning:

Whatever may be the changes that the remaining democracies shall have to undergo in their struggle for survival, the French example, coming eight years after the German *Praesidialregierung* of Brüning and Papen, shows that the unlimited decree-rule of a constitutional government with a dubious popular or parliamentary basis serves only as an intermediate station on the road to complete authoritarianism.

M. F. P. HERCHENRODER.

Legitimation, Legitimacy and Recognition in the Conflict of Laws.—The recent decision of our Court of Appeal in the case of *In re Luck* (1940, Ch. 323) makes particularly opportune an article in the *Canadian Bar Review* of October and November 1940 [1] on the questions of private international law involved in cases of legitimation, legitimacy and recognition of children. The article is by Professor Taintor, of the University of Mississippi, and is a most comprehensive survey of the subject as expounded in the American and the English cases, and also in Continental jurisprudence. The article makes also a powerful plea for the application of a more humane doctrine, that the status of a child should be determined by the law of its own domicile, where that favours legitimacy, without restriction by the law of the father's domicile, where that would stand in the way of legitimation. The term "recognition" is used to indicate the status of a recognized natural child which exists under the Civil Code and, as it is urged, also under the Common Law. The principle maintained is that, since the creation of a person's status involves the attribution of a complex aggregate of rights and duties, it should be determined by the law of the state with which the person has the most intimate contact, and that is the state of the domicile of the person. So if a child is born of a polygamous marriage which is valid by the law governing the marriage, the child is legitimate in relation to both parents. For the question is not whether the parents are married, but whether the child is legitimate. It is logical, then, to refuse to recognize that the status of marriage is created in such a case, but, on the other hand, to recognize the legitimacy of the issue. The mutual independence of these questions was the basis of the decision in an important case judged by the Appellate Division in South Africa (*Seedat's Execr.* v. *The Master*, Natal, 1917, App. Div. 302).

The American courts have been, naturally, far more prolific of decisions on these questions of legitimation and legitimacy than the British courts because of the different systems of law governing personal status in the United States.

The basis of the old English doctrine was stated in *Udny* v. *Udny* (1 Sc. App. 441, H. of L., 1869): "The status of the child—with respect to its capacity to be legitimated by the subsequent marriage of its parents —depends wholly upon the status of the putative father. . . . I do not think that the English law can recognize the capacity in any Englishman,

[1] The articles have been supplemented by a note by Mr. J. D. Falconbridge, K.C., in the January issue of the *Canadian Bar Review*.

by a change of domicile, to cause his paternity and consequent power of legitimation to be recognized." That broad principle has, however, been modified by recent statutes, particularly the Legitimacy Act of 1926. As it is put by the writer of the article: "The doctrine of legitimation *ab origine* has been repealed, and that of legitimation *ab praesenti* substituted by statute." The recent case of *In re Luck* raised, however, fresh questions as to the extent of the change, and made it necessary to decide whether legitimation may still relate back. In that case the father married while domiciled in England. Two children were born of the marriage. Later he deserted his wife and lived in the United States with a woman who bore him another child, David. Thereafter his English wife divorced him. Still later he acquired a domicile in the State of California, where he married a third woman. After this marriage he acknowledged David, and, with the consent of his wife, took him into his home as his son. It was clear that, under the law of California, David was legitimate. The question before the English court was whether he was entitled under the English will as "a child" of the father, and also as "issue" of the father's parent under an English settlement. Farwell J., who judged the case in first instance, held that he was not bound by the principle of *Udny* v. *Udny*, and that the question of status must be governed by the law of the domicile, *i.e.* the law of California. Since, by this law, David was the legitimate son of his father, and is to be deemed legitimate from the date of his birth, he was to be regarded as legitimate by the law of England and was one of the testator's (the father's father) issue. The Court of Appeal, however, was divided. The majority, Sir Wilfrid Greene M.R. and Luxmore L.J., rejected David's claim to legitimation. Scott L.J., dissenting, held that he was entitled as "a child" of his father under the English will, but not as issue under the English settlement. He criticized the use of the word "legitimate" in the Act of 1926; if it was intended to create only prospective legitimation, "the statutory misuse of a word in an abnormal sense cannot affect its non-statutory and normal meaning."

The writer expresses the hope about the decisions that, if the case is taken to the House of Lords, it will reinstate the judgment of the Chancery Division on the first part of the case, through consideration of the tendency of modern courts to favour the innocent child, and will affirm the Court of Appeal on the second part of the case, through consideration of the policy of the rule against perpetuities.

Enough, perhaps, has been said to indicate the importance of the article for all interested in the conflict of laws in matters of personal status. If one criticism of a most thorough and learned piece of work may be made, it is that the treatment of the English decision *In re Askew* (1930, 2 Ch. 259), a leading case on the adoption of the renvoi in our courts, is a little cursory.

The decision of the Court of Appeal in *re Luck* is dealt with also in a most searching and informing article in the January number of the

Law Quarterly Review by Dr. Mann, on "Legitimation and Adoption in Private International Law." The article makes some of the same criticisms of the decision of the majority in the Court of Appeal as are made in the *Canadian Bar Review*. It stresses particularly the point that, while any question of status normally depends upon the domicile at the relevant time or the last domicile, which is exclusively relevant, legitimation under the English decisions depends on the cumulative effect of two legal systems. The English law would not recognize legitimation by adoption under the law of the putative father's domicile as prevailing at the date of legitimation unless under the law of his domicile at the date of the child's birth there was a potentiality of subsequent legitimation.

The novel part of the article is, however, concerned with the law as to adoption of children, which is different from legitimation by recognition. It argues against the application of the rules laid down in English practice for legitimation by subsequent marriage to the cognate but distinguishable subject. Unlike the Legitimacy Act, 1926, the Adoption of Children Act contains no provision relating to adoption under a foreign law; and the principle suggested is that an adoption effected abroad should be recognized in England, if it is valid according to, or is treated as valid by, the *lex domicilii* of both adopter and adopted child. Special questions arise about the rights of succession of the adopted child. In England adoption does not confer any such rights on either adopter or child. In other countries the adopted child succeeds to the adopter's estate in the same way as the child born in wedlock. The rule which the writer approves was laid down by the Supreme Court of a State in the United States: the legality of an adoption is decided by the law of the State where it took place, but "that relation or status having been established, what the adopted child shall inherit should be determined in the case of personalty by the *lex domicilii* of the owner at the time of his decease, and real estate by the *lex rei sitae*." The Supreme Court of Canada gave some ten years ago an important decision that, in the construction of a will bequeathing property to "children," the claim of a named person who relies on his adoption abroad by that person is not valid.

Summing up, then: If English law applies to the succession, a child abroad is excluded; a child legitimated abroad should, before 1927, be similarly excluded, although the present practice, disregarding the problem of construction and attaching sole importance to the status of legitimacy or illegitimacy, is against this view.

NORMAN BENTWICH.

Loss of Expectation of Life.[1]—It can hardly he said that the concurrent findings of seven judges in the House of Lords in *Benham* v. *Gambling*[2] on the value of expectation of life of a child of two and a half

[1] See *Journ. Comp. Leg.*, Third Series, vol. xxii, pp. 238–40.

[2] 57 T.L.R. 177.

years, killed in a motor-car accident, are based on any very intelligible basis. The idea which seems to have dominated their lordships seems to have been that happiness was not normally inherent in life ; what is to be reckoned is a predominantly happy life. Many psychologists would argue that human activity in the vast majority of mankind is essentially productive of happiness, taking a simpler view than that which perhaps appeals to men of the highly artificial character necessarily associated with prolonged absorption in legal studies. They would contend that the number of years taken from life by negligence could usually be deemed an essential feature of the calculation on the ground that normally life in itself is happy. They would probably have greater sympathy as a matter of common sense with the assessment of the value of the lost years of the child's life at £1,200 than at £200, to which their lordships reduced the award of Asquith J., accepted by Slesser and MacKinnon L.JJ., though Goddard L.J. suggested £350 as enough.

A further difficulty is suggested by the remark of Lord Simon that even £200 would have been excessive if it were not that the circumstances of the infant were the most favourable. Yet all that appears is that the child was a normal healthy child, living in a country village, off the main road where the risk of being exposed to road dangers and to certain diseases would be less than in a crowded centre, while his father was in steady employment and had reasonable prospects of continuing it. The reference to the less risk of road dangers seems curious in that the infant thus met its death at the age of two and a half. It would seem that the circumstances might well have been classed as normal, thus saving difficulties in future assessments. Moreover, Lord Simon rules out as irrelevant social position or worldly possessions in reckoning the amount of damages, holding that "judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status." But moralists and philosophers would not be so unwise as to deny the importance of these things for human happiness, and the evaluation of expectation of life in any specific instance seems to be artificial if wealth or status is ignored.

The net result simply appears to be that the House of Lords has decided that low awards for loss of expectation of life are desirable, and that appeals are to be encouraged when any generous amount is given. It is quite possible to welcome the decision on practical grounds without pretending to feel any satisfaction with the psychology of happiness as understood by their lordships. The difficulty, however, of all such estimates may be judged by the fact that the Supreme Court of Canada [1] was compelled to send back for reassessment the value of the expectation of life of a girl of 23, in good health and with satisfactory prospects, which the jury in Ontario insisted at fixing at 500 dollars ; all the justices found that impossibly low. Perhaps Ontario has acted wisely in aban-

[1] *King* v. *Goodman*, [1940] S.C.R. 541 (prior to change of law taking effect).

doning this head of claim if juries could not be induced to take it seriously. No doubt assessment is always difficult, but it is not altogether satisfactory that the reckless destruction by a careless motorist of a child should not involve some solatium for the bereaved parents.

A. Berriedale Keith.

The Hellenic Institute of International and Foreign Law.—Under an Act passed in 1939 there has now been established in Athens the Hellenic Institute of International and Foreign Law, financed by an annual State grant. It operates under the supervision of the Minister of Justice with an Administrative Committee consisting of the President of the Council of State, President of the Court of Cassation, Dean of the Law Faculty of the University of Athens, the Chief of the Legal Department of the Foreign Office and the President of the Executive Board of the Bar of Athens, the General Director of the Department of Public Accounts and the Director of the Hellenic Institute of International and Foreign Law. The Director is Professor Vallindas, of the Law Faculty of the University of Athens, and the Secretary-General is Professor Eustathiades, of the School of Political Sciences.

The objects of the institute are defined to be:

(*a*) To promote scientific research on International and Foreign Law, particularly on matters concerning juridical questions relating to Greek affairs within and without the borders of Greece, and the development of the comparative study of the law.

(*b*) To afford information on International and Foreign Law to Ministries, courts and other administrative authorities, as also to lawyers and notaries.

(*c*) To afford information on International and Foreign Law to the Legislative Commission of the Ministry of Justice.

(*d*) To afford information on Hellenic Law to international or foreign courts and authorities, to lawyers and notaries abroad, and to contribute, by all possible means and efforts, to make Hellenic Law better known and better applied abroad.

The Annual Register.[1]—Owing to the disturbance of the Society's work at the end of the year there has been delay in publishing an acknowledgment of the last volume of the Annual Register. It provides an opportunity to express sincere sympathy with the publishers, Messrs. Longmans, Green & Co., who suffered as much as, if not more than, any firm in the trade when so much damage was done in the City of London. The publication of a series of this kind, which is a balanced survey of events at home and abroad has particular value under present conditions. Dr. Epstein is maintaining the utility of a publication which has now

[1] *The Annual Register*, 1939. (London: Longmans, Green & Co.) Pp. xiv+507. 30*s*.

been in existence for nearly two hundred years, and enables the perspective to be retained of the national welfare amid all the varying changes which have occurred from time to time. There is every reason to believe that the publishers will be able to add the review for 1940 in due course in spite of all difficulties.

Personal Law in British India.—The subject of the Sir George Birdwood Memorial Lecture delivered before the India and Burma Section of the Royal Society of Arts on February 21 by Sir George Rankin was "The Personal Law in British India." In opening the lecture he explained the difficulty of defining Personal Law and suggested that in India it is "law that is different for different people—generally speaking, for people of different religion—in contradistinction from the general law of the land applicable *prima facie* to everyone. The Hindu law and the Mahomedan law are the most important of these personal laws." At the same time the lecturer did not wish to suggest that the Hindu and Mahomedan laws are the only personal laws recognized in India, as in addition there is, for example, the Burmese Buddhist law which may have to be applied to a particular case. At the same time this Personal law is now quite in the same position as the Common Law in England. "It is indeed," continued the lecturer, "a conspicuous feature of the history of law in British India that until comparatively recent years there was, outside the Presidency towns, no law generally applicable as *lex loci* or law of the land. In England, when the King's justices went on circuit through the country, the unwritten law applied by them to the whole of the realm was in contrast with the particular customs or rules of particular manors and other jurisdictions, and came to be called the 'Common Law.' In modern times the phrase is chiefly used in contrast with 'Statute Law.' But in India the course of history was such that only by legislative enactment was a 'common' law arrived at, and then only in the sense of law applicable *prima facie* to everyone, though subject to particular exceptions for particular classes. That there was no such thing as a common law for India in 1833 may be seen from the Charter Act itself." A verbatim report of the lecture, which contained a most valuable survey of historical research, is to be printed in the April issue of the *Journal of the Royal Society of Arts*.

Limitation of Air Warfare.—Professor Howard S. LeRoy, of the National University, Washington, delivered a most interesting address to the section on International and Comparative Law at the annual meeting of the American Bar Association. He traced the endeavours made by international conferences to place some restriction upon air warfare and came to the conclusion that attempts at such limitation made in good faith have not been effective. For one thing aeronautical technique has made such phenomenal progress that it has been impossible for any kind of legislative provisions to keep pace with it. It has added to the

unity of warfare by completing the trinity of natural elements in a theatre of three-dimensional operations, namely land, water and air. The extent to which they are now able to operate in co-operation has complicated the problem of the limitation of air warfare since any attempt at it now ramifies into land and naval warfare in such a way as to become involved inextricably with general armament problems. At the same time Professor LeRoy points out that the maximum utility of the aeronautical art can be derived only from a full integration with land and naval forces. As regards the practicability of any limitation he points out that nations generally have refused to outlaw the use of a new and effective military operation. At the same time he regards air power as primarily a disarming and not a slaying power. It is a step away from mass slaughter, though perhaps the Professor does not quite realize the extent to which it can be used as a merely destructive agency. His point is that air power has merely extended inland the radius of the danger to which cities on the coast have been subject for generations by naval bombardment. The limitation principle which has determined the extent of that bombardment has hitherto been its military objective. Air power, he observes, inherits that principle. Stress has been laid upon that by the British air force, though there is little evidence of its adoption by the German air force.

Institutes of Legal Medicine.—Professor Knud Sand, Professor of Legal Medicine in the University of Copenhagen, contributed to the *Medico-Legal Review* (October, 1940) a description of the Medico-Legal Institute attached to his university. It was founded in 1910 and has been repeatedly enlarged during the past ten years, so that it is now fully equipped with laboratories, post-mortem rooms, lecture rooms and a good library. The institute is not only available for instruction in medical jurisprudence, but is also a central medico-legal institution at the service of the State. Courses of instruction are held for medical officers of health as well as lawyers, police officers, and even for judges. The institute undertakes to make examinations only when required to do so by the police, law courts, medical officers of health and not for private persons. It has, however, been found necessary to make an exception for certain examinations including blood-group examinations in paternity cases at the request of barristers, solicitors and medical practitioners. There are similar institutes on a smaller scale in Stockholm and Helsinki.

NOTICES OF BOOKS.

LA VALIDITÉ DES TRAITÉS INTERNATIONAUX.[1]

THIS is an interesting treatise on one aspect of international treaty law. It is confined, as its title suggests, to questions falling under the head of the *validity* of treaties ; it does not deal with questions of interpretation, nor with any doctrine of treaty revision, nor with the much-discussed rule of the so-called *Clausula rebus sic stantibus*. The author has devoted great industry to his work, each chapter being prefaced with a very full, not to say formidable, list of authorities in which American, British, French, German and Italian authors all find their place. It is a pity that the book is not furnished with an index.

After a brief introduction the author deals first with the question of the capacity and competence of the parties to treaties. He then passes to a full and interesting discussion of the part played by the will of the contracting parties and the effect of the threat of force or violence upon the ultimate validity of a treaty. Questions arising from the character of the object of the treaty are then discussed : how far is an immoral treaty, or a treaty whose object is contrary to law, to be considered as valid ? Finally the author deals with points as to the form of treaties, such as the necessity or otherwise of ratification and questions connected with registration, particularly under Article 18 of the Covenant of the League of Nations. Publication of the book took place in 1940 after the outbreak of the present war ; it is pleasant to find the work of a scholar undisturbed by the crash of bombs or the noise of gunfire.

The author defines treaties as " all unions of the wills of two or more subjects of international law with a view to establishing between them relations governed by international law " (*Toutes les rencontres de volonté de deux ou plusieurs sujets internationaux en vue d'établir entre eux des rapports réglés par le droit international*). This definition would seem to be more appropriate to treaties containing executory obligations than to treaties whose effect is executed at the moment when they enter into force, *e.g.* treaties transferring territory. On the other hand, the definition is apparently wide enough to include an accepted declaration of war—for that is in strictness an event in which the wills of two states are in agreement to establish a condition regulated by the international law of war.

[1] *La Validité des Traités Internationaux.* Par Eduardo Vitta. (Leyden : Bibliotheca Visseriana XIV, E. J. Brill, 1940.) Pp. 247.

As to the binding effect of treaties made under the compulsion of superior or even overwhelming military force the author takes the only view which has any chance of acceptance, viz. that this is a point on which the analogy of contracts in the municipal law of most, if not all, civilized countries breaks down ; the only conclusion possible is that supported by the universal international custom according to which the validity of such treaties is beyond the possibility of challenge, *coactus voluit sed tamen voluit*. The opinion of Pope Clement VII that he was not obliged to observe a treaty " because being forced he was not bound " has not, for international lawyers at any rate, the stamp of infallibility. It is interesting to find that Montaigne would no doubt have supported the generally received doctrine ; with his customary shrewdness and common sense he holds that a promise to pay a ransom to robbers extorted by fear must nevertheless be kept. " *Des voleurs vous ont prins, ils vous ont remis en liberté, ayant tiré de vous serment du payement de certaine somme. On a tort de dire qu'un homme de bien sera quitte de sa foy, sans payer, estant hors de leurs mains. Il n'en est rien : ce que la crainte m'a fait une fois vouloir, je suis tenu de le vouloir encores, sans crainte ; et, quand elle n'aura forcé que ma langue sans la volonté, encores suis-je tenu de faire la maille bonne de ma parole.*"[1]

And indeed it seems highly probable that, in the very improbable event of two states agreeing to arbitrate the question whether a treaty extorted by fear of international violence is valid, the tribunal will accept the view of Montaigne even if it does not refer to him as an authority. But how far we of the present generation are from any such arbitration !

J. F. W.

LAW OF PRIZE.[2]

Dr. Colombos has revised a book on the Law of Prize which he published early in the last war. The first edition was distinguished for its clearness and conciseness of exposition. This second edition fully maintains those qualities, and, further, it includes a note of all the principal prize decisions given not only by the British courts, but by all the Continental tribunals. The author has made himself master of all the jurisprudence, and, at the same time, carries his learning easily. The book takes account of the few decisions in prize matters which have been given during this war ; though, as the author remarks, " it is too early yet to appreciate the effect of the changed conditions of modern war and of the increased participation of aircraft in naval warfare on the judgments of Prize Courts." For the most part he restricts himself to a statement of the rules as applied by the courts. But he does occasionally indulge in a general reflection, as where he speaks of the Doctrine of Retaliation. Restrictions of space have induced the omission from this edition of the introductory chapter that

[1] *Essais de Montaigne*, livre III, ch. 1.

[2] *Law of Prize*, by C. John Colombos, LL.D. 2nd Edition. (The Grotius Society, 1940.) Pp. xii. + 387. 21*s*.

was contributed to the original work by Professor Pearce Higgins. On the other hand, he has still included a chapter on the International Prize Court. In its arrangement, its system of reference and its annotation the book is a model, and it shows throughout the most careful hand.

NORMAN BENTWICH.

CANADIAN LAW OF TRADE MARKS.[1]

IN writing his comprehensive work on the Canadian Law of Trade Marks and Industrial Designs, Mr. Fox has rendered a great service to all those interested in this branch of the law, more particularly since, as stated in the preface, no other book on the subject has appeared for twenty years. The subject-matter has been arranged in such order and with such clarity and conciseness that the book will be of value not only to the student but as a work of reference for the practitioner.

The author traces the history of the different aspects of his subject, and comparisons with the corresponding British law are drawn wherever opportunity presents itself. It is interesting to note that provision for the registration of trade marks was made in Canada some time before similar legislation made it possible in this country. Registration commenced in the Province of Canada in 1861 and in New Brunswick in 1867, while the Trade Mark and Design Act, 1868, made registration of trade marks and industrial designs possible throughout the Dominion in that year.

The difference between the British and Canadian trade mark laws has become more pronounced since the passing of the Trade Marks Act, 1938 in this country, and the law as far as the assignment and licensing of trade marks is concerned is the same in Canada as it was in the United Kingdom before the passing of that Act. The assignment of a trade mark in Canada can therefore only take place in conjunction with the goodwill of the business in which the mark has been used, and there is no provision for the creation of registered users of a mark. This provision has been made in this country with certain safeguards, thereby creating the possibility of licensing persons other than the registered proprietor to use a registered trade mark.

Almost the whole of the relevant Canadian law is contained in the Unfair Competition Act, 1932, and the learned author deals very fully with the question of registration. It should be noted that application to register a trade mark in Canada must be made within six months of the date of its first use in Canada or of the date upon which it was first made known in Canada, and the Act provides that the first user may still register after this period of six months if no one else has done so. An interpretation has, however, been put on the section by the courts to the effect that the first user of a mark or the person making the mark known in Canada

[1] *Canadian Law of Trade Marks*, by Harold G. Fox, K.C. (Toronto: The Carswell Company, Ltd.) $18.50.

is entitled to its exclusive use if he registers within the six months period: if he does not register within that period he loses the right to do so.

In Canada registrable trade marks are divided into word marks and design marks, and there are a number of detailed provisions set out, the result of which is that the essentials of registrability appear to differ considerably from those laid down in the British Trade Marks Act. The same broad principles as to the unregistrability of surnames, descriptive or misdescriptive words, geographical words and marks too closely resembling other marks already on the register are, however, to be found in Canadian law as in British, and a Canadian mark must be distinctive, although this word is employed in a somewhat different sense to its meaning in this country. Tables of marks are set out which have been held to infringe or resemble other marks or which have been regarded as descriptive, distinctive or geographical, and these will be found to be of great value to the practitioner.

The Canadian law of passing off, trade names and trade libel has been codified in the Unfair Competition Act, 1932, and remains substantially the same as the British Common Law. The vexed question of the right of a person to use his own name has been exhaustively discussed by the author, who differs from the views expressed by Mr. Justice Angers in the Exchequer Court of Canada in the most recent decision quoted. S. 9 is in question, and it includes a definite provision that an individual may use his name as a trade name for a business carried on for his own benefit in good faith and without any intention to deceive. It is submitted that as far as the British Common Law is concerned the dicta in *Burgess* v. *Burgess* approved in *Reddaway* v. *Banham* are still good law and that it is a question of evidence in each case whether there is a false representation or not. It is not essential in this country to prove fraudulent intent.

Mr. Fox also deals with the Criminal Law of False Marking, which corresponds to the Merchandise Marks Act of 1887, and then proceeds to consider at some length the subject of industrial designs. It is interesting to note that the Canadian Design Act contains no definition of an industrial design, but it has been held that it must cover features of shape, pattern and ornament, that it must be judged by the eye and that the design must be original. A design may be registered in Canada for a period of five years and is renewable for one period of five years as distinct from two such periods in the United Kingdom. Registration must take place within one year of publication as distinct from registration before publication in this country. The British cases are referred to at some length on the question of infringement.

The value of the book is enhanced by the inclusion of the Canadian Patents, Designs, Copyright and Trade Marks (Emergency) Order, 1939, which contains provisions similar to those to be found in the corresponding British legislation. In particular, the Registrar may in certain circum-

stances extend any time for taking action; he may also suspend registration of any application on the part of an enemy and may in certain circumstances grant to an applicant the right to use a trade mark registered in the name of the enemy or an enemy subject.

H. K. TURNER.

OPPENHEIM'S INTERNATIONAL LAW.

FEW words only are necessary to commend this, the second volume of the well-known and authoritative treatise, to English-speaking readers. The work,[1] the editor tells us, went to press in June 1940, "at a time of an anxious phase of a war whose outcome is bound to influence decisively the substance and the structure of International Law in the coming generation." But "the exposition of the existing law must disregard the possibility or the prospects of its changes in the future or the fact of its violations in the past." The edition, however, "includes the legal aspects of the events connected with the war" up to the date of going to press.

The events of the war are not the only matters which are responsible for changes from the text of the fifth edition. Further progress has been made by the editor in the work of rewriting and expanding the treatise. The preface gives a formidable list of sections which are new or practically new. Thus the awkward device of heavy brackets or a change of type to indicate the new matter has been avoided.

The editor thus encourages a reviewer to hope that the next edition of "Oppenheim" may record substantial progress in the work of making the rule of law and peaceable development abiding realities of the international structure of the world. How such changes may come about, it is idle to prophesy but perhaps not wholly useless to speculate. It may be that practical developments will take place by the extension of the federal principle in such a way as to substitute federally organized international units for a certain number, at any rate, of individual small states whose weakness presents a standing temptation to the aggressive desires of more powerful neighbours. Such federal organizations may point the way in which future generations may attack the problem of world government.

Again, it may be that the protection of the world from the abominations of modern war will be advanced by drastic developments of the law of neutrality. In this respect contemporary sentiment in the United States, to whom so much of the modern law of neutrality may be credited, is surely significant. America seems to be swinging back to the recognition and development of the rule of Grotius that neutrals shall do nothing that may strengthen a belligerent whose cause is unjust or hinder the movements of a belligerent whose cause is just—a rule with which West-

[1] *International Law.* Vol. II, *Disputes War and Neutrality*, 6th ed. By L. Oppenheim. Edited by H. Lauterpacht. (London: Longmans, Green & Co.) Pp. xliv + 766. 50*s*.

lake surely had sympathy when he taught that the general duty of every member of international society is to promote justice. A basis for the development of International Law on these lines is supplied by the Pact of Paris (Briand-Kellogg Pact) of 1928, for the Renunciation of War, an international instrument signed by over sixty states, including all the Great Powers ; the legal validity of this solemn engagement has not been destroyed by the many breaches of which some of its signatories have been guilty. The Pact covers far wider territory than the Covenant of the League of Nations. It has the advantage over the Covenant that it makes *all* aggressive war a violation of an international obligation. And it opens the door to further progress by depriving an aggressor of the protection which it affords to a loyal signatory, thus rendering possible the construction of a system of sanctions and justifying for the first time for a lawyer the often-expressed condemnation of war of aggression as an "international crime." A first attempt at progress on these lines was made in 1934 at the Budapest meeting of the International Law Association ; the short effect of the resolutions accepted at that gathering was that third states were freed from the restrictions of the hitherto accepted modern rules of neutrality in their attitude towards the aggressor. Interesting indications of such a movement of American opinion will be found in the October 1940 number of the *American Journal of International Law*. Indeed the attitude now taken up by the United States in relation to the present war is to a large extent a reduction to practice of the views of the lawyers who were responsible for those resolutions of the International Law Association.

The reviewer is here, perhaps, wandering beyond the terms of his reference, and readers must await a seventh (or perhaps a seventeenth ?) edition of Oppenheim for a statement of the changes of International Constitutional Law to which the events of the present war may give rise ; though the present condition of the world calls for early and drastic amendment.

It only remains to congratulate Professor Lauterpacht on the accomplishment of a piece of work not unworthy of the high reputation of Oppenheim and of the position now held by his editor.

J. F. W.

STUDIES IN THE ADEQUACY OF THE CONSTITUTION.[1]

THE title of this book, like most titles, is misleading without further explanation. The book's purpose is not to discuss the adequacy of the Constitution of the United States as a piece of political machinery to meet the urgent problems of the day, but a very careful analysis of those legal rules which come into operation through recent constitutional developments. In other words, it is the work of a lawyer who does not tread far into the wide open spaces of political science, and not of a political

[1] *Studies in the Adequacy of the Constitution.* By James Barclay Smith. (Los Angeles : Parker & Baird Company, 1939.) Pp. xv + 366. $3.50.

scientist who ventures into the jungle of the law. Into this jungle no English lawyer dares to penetrate, and the reviewer is in no position to judge of the value of the trails. Indeed, Professor Smith's style often causes the timid trespasser to stumble. It is clear, however, that the author has taken immense trouble to lead the way, and if the follower sees too many trees it is no doubt the fault of the follower. The subjects are certainly of immense importance—such as the limitations upon Government competition, price control of public utilities, local inter-state commerce and non-judicial tribunals. The work is very carefully done and the mass of case law well handled. The usual apparatus of a law-book is provided, and the book should prove useful to the increasing number of students interested in the conflict between law and economics.

W. I. J.

PUBLICATIONS OF THE UNIVERSITY OF LA PLATA.[1]

THE First South American Congress of Private International Law held at Montevideo in 1889 approved drafts of treaties dealing with international civil, commercial, penal and law, as well as with the law of copyright, patents and the exercise of liberal professions. The treaties were signed and ratified by the Argentine and some other South American states. In 1940 the Second South American Congress of Private International Law redrafted the said treaties with the exception of those dealing with trade marks and patents.

The newly created Instituto de Jurisprudencia of the Facultad de Ciencias Juridicas y Sociales of the La Plata University publishes this book as a part of an ambitious undertaking to collect and systematize Argentine and foreign jurisprudence generally. The book contains the texts of the treaties approved in 1889 and 1940 and forty decisions of the Supreme Court and Federal Appeal Courts of the Argentine given during the period of 1894–1914. These decisions deal with questions arising out of the construction and application of the treaties of 1889 by the Argentine courts. A second volume is promised containing cases decided in the Argentine between 1914 and 1939, as well as four other volumes (parts) containing decisions of the courts of Bolivia, Paraguay, Peru and Uruguay on the interpretation and application of the 1889 treaties. The publication when completed will be a monumental case-book on conflict of laws in South America and will be of very great value to all students of Private International Law.

The University of La Plata has already done magnificent work for the comparative study of law generally and of the laws of South America in particular. The University and the Director of the Instituto de Jurisprudencia, Señor Don Carlos Alberto Alcorta, are to be congratulated on

[1] *Los Tratados de Montevideo de* 1889 *y su interpretacion judicial.* Volumen I, Parte Ia. Fallos de la Cozte Suprema de Justicia y de la Camaras Federales de Apelacion de la Republica Argentina. La Plata, 1940. Pp. 538.

the publication of this book. The law of a country lives in recorded cases and can be studied by analysing such cases much better than by reading the provisions of codes or by inquiring into the origin of these provisions.

V. R. IDELSON.

The following books have also been received : [1]

Advisory Bodies (1919–39). Edited by R. V. Vernon and N. Mansergh. (London : George Allen & Unwin, Ltd.) Pp. 520. 18*s*.

Baluchistan Code. (New Delhi : Government of India Press, 1940.) Pp. xix + 277.

The fifth edition of the code contains the legal enactments in force to the end of 1938. It has been prepared on the lines of previous editions.

City Manager Government in the United States. By Harold A. Stone, Don K. Price, Kathryn H. Stone. (Chicago : Public Administration Service.) Pp. xv + 279. $2.50.

Geneva Racket, 1920–39. By Robert Dell. (London : Robert Hale, Ltd.) Pp. 375. 18*s*.

Laws of Gibraltar. (London : Crown Agents for the Colonies.) Pp. xxx + 305. 15*s*.

Mr. Mansel Reece, the Attorney-General, has prepared a supplement to the laws of Gibraltar containing the legislation enacted during the years from 1936 to 1939 which remained in force on December 31, 1939. The opportunity has been taken to add a list of *errata* discovered in the 1935 edition.

Ordinances of Hong Kong. 1937 Edition. (London : Crown Agents for the Colonies.) Pp. ix + 1364–1965.

The third volume of the revised edition of the laws, now in preparation, by Mr. J. A. Fraser, contains the legislation passed in the years 1915–31.

Laws of the Somaliland Protectorate. (London : Crown Agents for the Colonies.) Pp. lxv + 361. 20*s*.

The supplement to the laws contains the Ordinances enacted between January 1, 1938, and December 31, 1939, and subsidiary legislation issued between those dates.

Straits Settlements Law Reports. 1939. Edited by John Laycock, R. Williamson. (Singapore : Government Publications Bureau.) Pp. xxxvii + 292. $15 or 35*s*.

World Order Papers. 1st Series. (London : Royal Institute of International Affairs.) Pp. 176. 3*s*. 6*d*.

The following periodicals are also received : American Bar Association Journal ; American Journal of International Law ; American Political Science Review ; The Arbitration Journal ; Bombay Law Journal ; Bombay Law Reporter ; Calcutta Weekly Notes ; Canadian Bar Review ;

[1] Mention here does not preclude review later.

Chinese Social and Political Science Review ; Columbia Law Review ; L'Egypte Contemporaine ; Headway ; Hindustan Review ; International Labour Office Bulletin ; International Labour Review ; Journal of the Parliaments of the Empire ; Juridical Review ; Law Quarterly Review ; Madras Law Journal ; New York University Law Quarterly Review ; Revue Internationale de la Croix Rouge ; South African Law Journal ; Toronto University Law Review ; Tulane Law Review ; Wisconsin Law Review.

THE MEANING OF SOCIAL SECURITY.

[*Contributed by* MAURICE STACK, ESQ., *Technical Adviser, Social Insurance Section, International Labour Organization.*]

THE expression " social security " has, in a very few years, gained universal currency in the United States and the British Commonwealth, and has come to stand for the main objective of the post-war reorganization of society. But its meaning, its denotation and connotation, is still vague. That it speaks to the condition of the masses as a symbol of an end greatly desired has been duly sensed by statesmen. For immediate political purposes the value of a slogan may consist in its wide emotional appeal, and the possibility that individuals will understand it differently, though conformably with their several aspirations, is rather an advantage. For purposes of discussion, on the contrary, agreement on the approximate meaning of essential terms is indispensable. The importance of " social security " as an *idée force* justifies an attempt to clarify its meaning.

The Meaning in Present Usage.—The analysis may start from the constituent words of the expression. " Security " means freedom from worry. " Social," in a political context, refers to political society. So we might suppose that " social security " is the freedom of society itself from worry. Society might worry about aggression from without, but in that context society is called a nation. Society might worry about injustice, ignorance, poverty and disease in its midst, about the less fortunate of its members. It might do so for two reasons: out of sympathy and idealism, and out of fear of the disorder that extensive misery might produce. Our analysis suggests that " social security " means that security from injustice, etc., which society provides for its members, with an eye to its own preservation.

This deductive conclusion may now be compared with that which may be drawn inductively from the actual use of " social security " in instances so important as necessarily to determine its connotation in the public mind. Three such instances will be referred to.

On what was perhaps the first occasion of its use, " social security " caught the notice of a world-wide public as the title of what President Roosevelt has characterized as the broadest and most enduring measure of the New Deal. In a message addressed to the Congress of the United States on June 8, 1934, President Roosevelt announced that, among the essential objectives of the new programme, representing the permanent aspiration of the people, was security for the individual against the hazards and vicissitudes of life, to be afforded through social insurance :—

" I am working for a sound means which I can recommend to provide at once security against several of the great disturbing factors in life—especially those which relate to unemployment and old age . . . I believe that the funds necessary to provide this insurance should be raised by contributions rather than by an increase in general taxation."

Effect was given to the programme by the Economic Security Bill,

which, under the changed title of " Social Security Act," was passed by Congress on August 14, 1935 ; it was amended in 1939, when survivors' insurance was introduced.

" Its purpose is to prevent and relieve the misfortunes that come when earnings are cut off by lack of work, old age, blindness, or death ; when children are left with no one to support them or when they lack necessary care ; and when the health of the community is not properly protected. . . . To prevent future hardships and make for the security of working people and their families the Social Security Act provides social insurance protection. This enables wage earners to build up an income for the times when earnings stop because of unemployment, old age or death. . . . To relieve present hardships and care for people whose needs are not met by the social insurance programmes, the Act provides various other kinds of protection. For needy old people, for dependent children, and for the needy blind, this means cash allowances each month. For mothers and children it means special health and welfare services. For disabled workers it means re-training for other kinds of work, so they can be self-supporting again. For people in general it means extending public health services in every part of the country."[1]

Thus, besides providing employment security and security for aged workers and for survivors of deceased workers by means of social insurance, the Act gives Federal aid to a wide variety of other services : public assistance to certain categories of needy individuals not yet able to benefit under the insurance systems, maternal and child welfare services, and public health services. It is clear that social security is *par excellence* the correlative of social insurance, but that public assistance complying with certain standards may also be regarded as affording security, albeit of an inferior order ; while the health provisions constitute a first instalment of " health security," the ultimate scope of which is not yet determined. We may conclude then, that in the United States social security means, according to the context, either the security which social insurance provides, or else the whole range of advantages which are afforded by the " social services " in Great Britain.

From the United States " social security " passed to New Zealand, whose Social Security Act, 1938, has presented the world with a new model of legislation combining features of social insurance and social assistance. We shall have occasion to refer later to the detail of this epoch-marking measure. At this point it suffices to observe that cash benefits are provided for all citizens in all cases of economic need. Benefit in cash and medical care are granted in virtue of legal rights, but the grant of cash benefits is in most cases subject to a liberally conceived means test. Every citizen must pay the " social security contribution " which is earmarked for financing the scheme, and the grant of benefit is in all cases conditional upon proof of payment of the contributions due.

" In the Social Security Act an attempt has been made, for the first time, to provide, as generously as possible, for all persons who have been deprived of the power to obtain a reasonable livelihood through age, illness, unemployment, widowhood or other misfortune. No one will claim that the provision now being made is the ultimate achievement possible, but it is an advance towards the ideal of universal security."[2]

[1] From a pamphlet issued in July, 1940, by the Social Security Board : *What is Social Security ?*

[2] From an official pamphlet explaining the Social Security Act, 1938.

" Social Security " in New Zealand means therefore the assurance enjoyed by every individual that, in every contingency which deprives him of the means of subsistence, he will receive a cash benefit, the amount of which is determined by arithmetical rules, and is related to a minimum standard of living ; and that he will receive gratuitously every form of necessary medical care. The fact that the individual must pay a contribution is an accidental, rather than an essential, feature of the scheme.

Comparing the sense of " social security " in the United States and in New Zealand, we may note important differences, as well as similarities. The American Act covers, but incompletely, a very broad field, providing not only benefits for individuals but also protection for communities as such through public health services. The New Zealand Act is concerned solely with benefits for individuals, but for these it makes complete provision, assuring its citizens of a minimum standard of living in all contingencies and caring fully for their health. The American Act establishes two levels of security, the one by insurance, the other by assistance. The New Zealand Act establishes a single level, by an amalgam of insurance and assistance.

From the United States and New Zealand " social security " has passed to Great Britain where it has acquired the status of a war aim, but with a new connotation. Mr. Bevin declared on November 20, 1940, that social security is to be " the main motive of all our national life." He continued :—

" That does not mean that all profits and surpluses would be wiped out, but it does mean that the whole of your economy, finance, organization, science and everything would be directed to social security, but not for a small middle class or for those who may be mere possessors of property, but for the community as a whole."

And Mr. Eden, in the course of a speech on May 29, 1941, referring to President Roosevelt's " four essential human freedoms," equated social security with freedom from want :—

" We have declared that social security must be the first object of our domestic policy after the war. And social security will be our policy abroad not less than at home. It will be our wish to work with others to prevent the starvation of the post-armistice period, the currency disorders throughout Europe and the wide fluctuations of employment, markets and prices which were the cause of so much misery in the twenty years between the two wars. . . . The problem . . . is the establishment of an international economic system capable of translating the technical possibilities of production with actual plenty and maintaining the whole population in continuous fruitful activity."

For both Mr. Bevin and Mr. Eden, social security is essentially the fruit of a planned national and international economy—not a by-product but the product. Remembering that unemployment was, directly or indirectly, the curse of the pre-war world, and economic disorganization the fount and origin of its troubles, they appear to be thinking of social security primarily in terms of employment. But much more than that could be read into Mr. Bevin's utterance, for he seems to imply that what must be secured is a decent standard of living for all.

In the pre-war " social-service State " of the western world, industry has been a licensed libertine, and as the price of its licence, it has been mulcted of social charges. The price at which economic individualism

could continue to be tolerated has constantly risen, until industry could no longer meet the demand. Above all, the years of unemployment ruined the prestige of the traditional economic system. The free-grazing capitalist cow ceased to provide enough milk. Mr. Bevin implies that it must be put on a scientific diet so that it can. A further implication is that, if industry is reorganized and managed in the interest of the community as a whole, the attitude of the worker towards it must change correspondingly, as he realizes his responsibility for the dividend of production.

The interest of these utterances of British Ministers lies for our present purpose in the emphasis which they rightly lay on the economic reorganization which is a preliminary condition for the realization of any social policy which could be judged adequate to-day. But they are not helpful in arriving at a working definition of social security. For, on the one hand, the scope of the term, whatever it may be, is certainly wider than that of employment security. And, on the other hand, if the term is to signify the assurance of all the elements which make up a decent standard of living, then its scope is quite unmanageably large.

We shall therefore fall back upon our etymological analysis and our account of American and New Zealand usage, and, somewhat arbitrarily, formulate a tentative definition of " social security." We ought not to waste this term : we ought to reserve it for a new and dynamic conception which is real and operative, but for which an established name is lacking.

Social security then is security which society provides, through appropriate organization, against certain wants to which its members are exposed, either the population at large or important classes. They are essentially wants against which the individual cannot be expected to provide by his own ability and foresight alone, or even in private association with others. It is characteristic of these wants that they arise out of emergencies, occasions or limited periods of straitened means or extraordinary expenses, and that failure to deal with them has serious consequences both for the individual and for society. In other words, they are wants against which social insurance and social assistance were invented to provide.

It is not every kind of provision, however, that can be considered to afford " security." In order that the individual may enjoy freedom from worry, the provision made must be reasonably adjusted to the want, the individual must be able to rely upon it, and to avail himself of it under conditions which do not affect his self-respect.

Again, security from want means primarily assurance that the want will not occur, and only secondarily assurance that help will be forthcoming if the want arises. Consequently, those institutions whose business it is to provide and promote social security will have, in principle, the twofold function of preventing the occasions of want and, in default of prevention, of affording relief.

The modes of providing social security may be called " social security services " and may be classified under the headings of social insurance and social assistance. We now proceed to discuss the connotation of these two expressions, with respect to the ends and means which they imply.

International Standards of Social Insurance and Assistance.—Standards, carrying international authority, have been established for social insurance and, incidentally, for social assistance, by the International Labour Conference during the twenty years between the World Wars. The Constitution of the International Labour Organization lists, as examples

of necessary objects of labour legislation, the protection of the worker against sickness and against industrial accident and disease, and the provision of invalidity and old-age pensions. When, in 1925, the Conference first addressed itself to the consideration of these topics, it expressed an emphatic preference for social insurance as the method of attaining the objects exemplified above. On later occasions, however, the Conference accorded guarded recognition to social assistance, in cases where social insurance might not be well adapted to provide sufficient protection. It should be remembered that hitherto the Conference has concerned itself primarily with the protection of the working class as such, and the respective merits of social insurance and social assistance have therefore been judged as means of providing security for the workers and their dependants.

The vast majority of wage earners are dependent for their livelihood solely or mainly on the regular exercise of some trade. When this activity stops temporarily or permanently owing to an industrial accident, sickness, invalidity, old age, premature death or unemployment, the income of the worker and his dependants ceases. This means that the workers live in a state of continual insecurity, which, besides being an evil for them as individuals, is an obstacle to the satisfactory organization of industry and to social peace. Every nation is therefore bound to search for a sound solution of this abiding problem of insecurity in its working population.

Individual thrift, each person trying to accumulate his own reserve against an emergency which deprives him of his wages, is evidently ineffective and wasteful as a method of meeting the essential problem, though it has a permanent place as a means of enhancing the security afforded by collective methods.

All collective methods involve either assistance or insurance or a combination of the two.

Assistance denoted in the past the relief of the poor out of public funds. In the secularized Western World a peculiar stigma was long attached to poverty and incapacity for self-support: the indigent were regarded as quasi-criminals by the State, which treated them repressively. Receipt of poor relief involved loss of civil rights. The honest victim of misfortune and the lazy parasite were not distinguished. The local authorities who administered it were commonly hampered by lack of funds. The relief afforded was scanty, hardly averting starvation. The indigent had, in most countries, no rights, no claim he could enforce in a court of law: relief was purely precarious. As, in any case, relief was not granted until destitution had set in, and as it did not aim at rehabilitation, the recipient tended to remain, if not a pauper, on the margin of destitution. Such were the general characteristics of the poor laws of North-Western and Central Europe and in the United States at least until the beginning of the present century. In most other parts of the world the situation was worse in that the public authorities had no precise responsibilities for the relief of destitution. This duty was left mainly to the church and private charity, and their efforts, however humane, were sporadic and sometimes misdirected.

No wonder, therefore, that the working class hated the poor law, and tried to avoid recourse to it. Gallant and hopeful efforts were made by wage-earners in the nineteenth century to achieve security by organizing themselves into friendly societies and sharing their risks. These efforts had only a limited success. The societies were supported only by the

thriftier, more prosperous section of the workers. Even so, the contributions they could levy were insufficient to cover the risks they purported to assume; and their technical inadequacies and lack of authority prevented them from making the most effective use of such resources as they had.

The "friendly society" or, more generally, voluntary mutual aid did, however, pave the way for compulsory social insurance. In 1883 Germany extended throughout the Empire the principle of compulsory insurance which, having its origins in the incidents of mediæval guild organization, had long been applied on a small scale. In that year compulsory sickness and maternity insurance was introduced for workers employed in industry and commerce; within the next few years accident insurance and invalidity and old-age insurance were added; the insurances were extended to agricultural workers; and, after an interval, the structure was rounded off in 1911 with survivors' insurance. The German example was followed by Austria, and at a longer distance and less systematically by other European countries.

By the time that the International Labour Conference took up the study of social security, the German system, in its forty years of operation, had acquired immense prestige. The Germans were the foremost exponents of the theory and practice of social insurance, and their methods had been extensively imitated. It was natural, therefore, that the principles developed in Imperial and Republican Germany should have a profound, though not as it turned out an exclusive, influence on the social security standards elaborated by the Conference. Here was a system which, expressly designed for the protection of wage-earners, was preventing destitution in most of the emergencies to which they were exposed, was soundly financed, was administered democratically and, in its relations with individuals, was respectful of personal dignity. In comparison, voluntary insurance, morally admirable but generally ineffective, and poor relief, in spite of twentieth-century reforms still discredited, could play only a subsidiary part as instruments of social security, even if they were not to be rendered entirely superfluous.

At its 1925 session the Conference adopted a general resolution on the objects and characteristics of social insurance. The resolution affirmed that "the maintenance of a healthy and vigorous labour supply is of capital importance, not only for wage-earners themselves, but also for industrial communities desirous of developing their productive capacity," that social justice requires "the effective protection of the workers against the risks endangering their livelihood or that of their families," and that "this protection can best be attained by means of a system of social insurance granting clearly defined rights to the beneficiaries." The resolution went on to note that the social insurance systems already established by several States possessed the following characteristics:

They applied to the working-class population;

They covered occupational and non-occupational risks;

They granted benefits assuring workers and their families of at least a reasonable minimum standard of life;

They were financed by contributions from employers and workers and from public subsidies;

These were administered through mutual insurance institutions managed by employers and workers, with or without State participation, and designed to improve the conditions of life of the insured person.

These may be considered as the essential features of social insurance. All or most of them underly the detailed provisions of the Conventions and Recommendations on the several branches of insurance which were framed and adopted by the Conference between 1925 and 1936, and which constitute the international canon of social insurance. The Conference dealt with the different branches in turn, as they became ripe for international regulation, that is to say, when a substantial group of States had established insurance schemes of the kind in question, homogeneous in fundamental matters, and had proved their feasibility and utility. Thus, workmen's compensation, already universal in industrial Europe by 1914, was the first to be legislated for, in 1925 ; sickness insurance followed in 1927 ; invalidity, old-age and survivors' insurance in 1933 ; provision for unemployment in 1934 ; the maintenance of the pension rights of migrants in 1935 ; and sickness insurance for seamen in 1936.

The Conventions themselves do not attempt to fix the amounts or rates of social insurance benefits : that was impracticable by reason of the incomparability of currencies, the variety of methods of computing benefits, and the variation of amounts and rates within the national schemes singly : the Recommendations, however, do give indications for fixing the level of benefits. The standards laid down by the Conventions determine with some precision the classes of persons who are to be insured —essentially all employed persons, with a possible exemption for middle-class salaried employees ; they prescribe conditions for the grant of benefit, *e.g.* waiting period, qualifying period of insurance, the form of the benefit, its duration, and the cases in which it may be suspended ; they assure the claimant of a right of appeal in case of refusal of benefit, etc. ; they specify the parties who are to contribute to the scheme ; and, where feasible and appropriate, they require the insurance to be administered by self-governing institutions.

The extent to which the nations of the world had by 1939 instituted the various branches of insurance by legislation conforming in all respects with the fairly high and detailed standards of the Conventions is indicated by the number of countries ratifying the Conventions, for example :

Workmen's Compensation (Accidents) Convention ..	19
Sickness Insurance (Industry, etc.) Convention ..	16
Invalidity and Old-age Insurance Conventions	3
Unemployment Provision Convention	4

The small figures for pension insurance and unemployment are explained partly indeed by the fewness of the countries whose laws reach the requisite standard, but partly also by the more recent date of the relevant Conventions, allowing less time for Governments to make up their mind to ratify, at a juncture when threats of aggression already began to preoccupy them. Happily, however, the influence of these Conventions and Recommendations is far from being confined to the States which have ratified or accepted them. The standards laid down by the Conference have unquestionably generated and maintained a pressure on the movement of legislation throughout the world. Schemes possessing the broad characteristics of social insurance, as defined by the 1925 Conference, but differing in details, sometimes of quite minor importance, from the terms

of the Conventions, are very numerous. Workmen's compensation, especially, is universal: before the present war it was to be found in 54 countries. Compulsory sickness insurance, extending at least to the wage-earners of industry, operates in some 25 countries, while the number of countries possessing schemes of invalidity, old-age and survivors' insurance applying to the same group is about 15.

Until about 1930, social insurance, with the exception of workmen's compensation, was to be found almost exclusively in Europe, but from then onwards it began to spread to the Western Hemisphere—in Japan it was introduced in 1926. The keen interest in the subject manifested by the American countries had the result that social insurance took a very important place in the work of the special Labour Conferences of American States held under the auspices of the International Labour Organization at Santiago de Chile in 1936, and at Havana in 1939. At these Conferences the whole body of international regulations on social insurance was surveyed, the aspirations and ideas of the American countries on this subject were ascertained, and there emerged a programme of principles and standards in harmony with past experience and present tendencies. The basic characteristics as laid down in 1925 were found valid and reaffirmed. The provisions of the Conventions and Recommendations were codified in consistent form, with certain new features, and presented in a general resolution.

A special resolution on the aims and functions of social insurance, adopted at Havana, expresses succinctly but adequately the essence of social insurance as internationally understood on the eve of the present war. The text is as follows :—

(1) Social insurance schemes, which must make the most rational and economical use of the resources at their disposal, are called upon :

(*a*) to organize the prevention of such contingencies as sickness, invalidity and industrial accidents, the occurrence of which deprives the worker of his earning capacity and means of subsistence, causes suffering and loss to the worker and his family, and diminishes the productivity of the community ;

(*b*) to restore as quickly and fully as possible the working capacity lost or reduced by reason of sickness or accident, and to facilitate the accomplishment of the function of maternity, essential both biologically and socially ;

(*c*) to supply the means of subsistence necessary in case of cessation or interruption of gainful activity as the result of sickness or accident, temporary or permanent invalidity, unemployment, old age, and premature death of the breadwinner.

(2) As against other methods of collective provision, such as social assistance or schemes of non-contributory pensions, financed entirely out of public funds (which may, however, be the only feasible way of caring for existing cases of need), compulsory social insurance offers substantial advantages :

(*a*) it associates the workers concerned, from whom a contribution is required, both materially and morally in the protection of their health and their working capacity ;

(*b*) it implies the establishment of autonomous insurance institutions, dedicated solely to the organization of prevention and the service of medical and cash benefits ;

(*c*) it grants benefits in virtue of definite rights, and thus preserves the self-respect of the beneficiary, who is secured against arbitrary decisions on the part of the body responsible for awarding benefits ;

(*d*) it guarantees the payment of benefits by the assignment of specific resources, and by distributing the cost over long periods in accordance with the rules of actuarial science.

(3) Health security calls for the application of a co-ordinated system of benefits in kind designed to make available to insured persons and their families the resources of modern medicine for the preservation of their health and for the detection and treatment of disease in its earliest stages. For this purpose the insurance scheme must grant the following benefits, in so far as they are not provided by a public medical service which is generally accessible : general medical care ; supply of medicines and curative appliances ; necessary surgical operations and services of specialists ; assistance at confinement ; dental treatment ; necessary facilities for treatment in hospitals and curative establishments.

While providing efficient care for the individual, insurance schemes must, in the interests of the group which they serve, share in the campaign against diseases which are particularly frequent in the insured population, and which cannot be combated or prevented by medical treatment alone, but call for systematic preventive action combined with medical and social measures. Insurance schemes participate likewise in general preventive measures, and contribute to the improvement of the housing conditions of the insured population.

(4) The cash benefits of insurance schemes secure the maintenance of the insured person and his family in case of incapacity for work resulting from sickness or accident, and in the case of unemployment. In order to increase the economic security of the workers, it is necessary to institute, for the invalid and aged, and for widows and orphans, pensions which take account of the ordinary standard of living and of the family responsibilities of the pensioner, and which may not, in any case, fall below a prescribed minimum.

Here, for the first time, explicit reasons are given for according preference to social insurance over other methods of collective provision. It will be noticed, however, that " social assistance or schemes of non-contributory pensions " are admitted as being a possible, even necessary, means of meeting existing cases of need, that " a public medical service which is generally accessible " is accepted as a substitute for a purely insurance service. It will be further noticed that social insurance is not to pursue a line of intolerant separatism, but, without of course losing its identity, is to co-operate in general measures to combat disease and to improve housing. These attitudes are entirely consistent with the policy hitherto followed by the International Labour Conference, which, in the social insurance Conventions, has included some references to social assistance and non-contributory pensions.

" Social assistance " is the name given in Continental Europe to certain services, established by law and financed from public funds, which have developed out of, or by the side of, the general systems of poor relief. This development began at different times in different countries, but the introduction of the several types of service has tended to follow the same order. Generalizing very broadly, one might say that the movement began in Europe about 1910, and in North America some ten or

fifteen years later. The reports, issued in 1909, of the Royal Commission on the Poor Law in Great Britain concluded that the miscellany of paupers aggregated in the workhouses should be classified, and each class dealt with separately and constructively according to its needs : children, aged and infirm, sick, and so on. A similar movement proceeded on the Continent. Whereas the old poor law was essentially a police measure, the new social assistance had in view considerations of justice and decency as well as the interests of society, both immediate and distant. The rump of the old poor law might remain for a residue, but for those classes which could be assisted without danger of encouraging pauperism, which seemed to have a special claim on society, or which, if neglected, would injure the quality of society itself, special schemes of social assistance were established, recourse to which involved no restriction of civil rights, and the grant of which was not conditional upon destitution but upon insufficiency of personal means to meet the particular present need.

The variety of social assistance services is great and increasing. Among the earliest forms to be separated from the original poor-relief system were general medical aid for the indigent and the care of neglected children. Special services are established for the treatment of tuberculosis and venereal diseases, following the older institutions for mental disorders and contagious diseases. The loss of population in the first World War hastened the development of maternal and infant welfare schemes and of family allowances, though the latter, for several reasons, would hardly be included among social assistance services. The world-wide depression of the early 'thirties led, in a dozen countries, to the introduction of special schemes of assistance for the unemployed, partly because the ordinary resources of the poor law were insufficient to meet the extraordinary demands upon them, and partly because the mass of unemployed would not tolerate being treated as paupers. At various dates within the last forty years non-contributory pensions have been introduced—in Denmark, New Zealand, Australia, France, Great Britain and Ireland, Canada and the United States—for the benefit of the aged, widows with young children, the blind and the invalid. In some countries these pensions are hardly distinguishable from out-door poor relief, while in others they represent an advanced form of social assistance.

The Conference has referred to social assistance in certain Conventions in which it seemed advisable, subject to definite safeguards, to recognize it as a substitute for social insurance. From these references it is possible to form a general idea of the conditions which social assistance must satisfy in order to be accepted as an instrument of social security.

The Childbirth Convention, 1919, requires that a woman absent from work on account of childbirth shall " be paid benefits sufficient for the full and healthy maintenance of herself and her child, provided either out of public funds or by a system of insurance . . . and . . . shall be entitled to free attendance." Here it is indifferent whether the cash and medical benefit is provided by social assistance or social insurance, as long as it is not the employer's responsibility. But the right to the benefits is absolute, and for the adequacy of the cash benefit, a high standard is insisted upon.

In 1932 an international committee of experts, serving the International Labour Office in a consultative capacity, drew up guiding principles for the curative and preventive assistance to be provided by the institutions administering invalidity, old-age, and widows' and orphans' insurance. It was recommended that " all insured persons and

pensioners should be eligible for assistance as soon as, and in so far as, they are not entitled to it by law at the hands of another branch of insurance or of a public medical service available to these classes." In order to avoid overlapping and to obtain the fullest utilization of existing facilities, recommendations were made for the participation of an insurance institution with other bodies in a general campaign against social disease. " Its participation should secure for persons entitled to insurance benefits an improvement and extension of treatment and preventive care (unless such treatment and care are made generally available through a public medical service)." It will be seen that the public medical service, in order that its existence may dispense with the insurance institution from organizing its own service, must be one to which persons of the insured class are, by law, entitled to avail themselves of and one which provides entirely adequate treatment and care.

Each of the six Conventions of 1933 on old-age, invalidity and survivors' insurance for industry, etc., on the one hand, and agriculture on the other, admit non-contributory pensions as an alternative to pensions based on contribution rights. The admission, however, was reluctant, and was without practical consequences. For, on the one hand, no non-contributory pension scheme in existence then, or established since, attains all the standards prescribed and, on the other hand, only schemes already in existence at the time when the respective Conventions should come into force could be recognized. This latter condition may strike the reader as disingenuous, and in any case as inconsistent. But strong influences were opposed to non-contributory pensions, and those who might have been expected to advocate their merits failed to do so. The British workers' representatives supported, and indeed gave their preference to, the principle of non-contributory pensions. Workers' representatives from other countries, however, displayed little interest : they may have distrusted the possibility of adequate pensions on a non-contributory basis and have disliked the inevitable means test. Some Governments which had had experience with non-contributory pensions, and were alarmed at the continual increase in their cost, had either placed them on a contributory basis already, or were preparing to do so ; and other Governments were perhaps apprehensive, on the same grounds, of the possibility that non-contributory pensions might be proposed in their countries. On the other hand, there were a dozen Governments which approached the question is an unprejudiced spirit, and whose views largely determined the standards set by the Convention. These standards, which correspond broadly with the provisions of the most advanced non-contributory pension schemes, but which go beyond these provisions in some respects, are therefore worthy of serious consideration.

The fundamental condition for the recognition of a non-contributory pension scheme is that the right to the pension should be determined in such a way as to exclude the exercise of discretion by the administrative authority in the award of the pension and in the fixing of its amount. The pensionable age (65) and the definition of invalidity (general incapacity for work entailing inability to earn an appreciable income) were the same for non-contributory as for contributory pensions ; the non-contributory widow's pension, however, was made conditional upon the widow having young children dependent on her, whereas the contributory pension was not subject to this restriction. By analogy with the conditions relating to the qualifying period, and regularity of contribution payments which

are prescribed for the grant of contributory pensions, the Conventions fix for non-contributory pensions a qualifying period of residence of equal length and, so far as invalidity and old-age pensions are concerned, authorize the denial of a pension to one who " has persistently refused to earn his living by work compatible with his strength and capacity." The non-contributory pension for a person without means must be fixed " with due regard to the minimum standard of living " in the country concerned : there is no similar requirement in the case of contributory pensions. The pension for a person with means must be equal to the difference between his means and the full pension. In order to encourage thrift, however, provision must be made for disregarding means up to a certain level. The Conventions do not authorize the denial of a non-contributory pension to a person who has relatives liable for his maintenance. A right of appeal must be secured to claimants who dispute the decision given on their application for a non-contributory pension.

The Unemployment Provision Convention, 1934, may be ratified by countries which cover the risk of unemployment for all workers in industry and commerce by means of compulsory insurance or voluntary insurance combined with assistance. In comparing the treatment of voluntary insurance and social assistance in this Convention with their treatment in other social insurance Conventions, it must be remembered that compulsory unemployment insurance was less widely developed than other branches of social insurance, that unemployment, but not other risks, may reach catastrophic dimensions which the technique of insurance is not adapted to cover, and that, consequently, unemployment assistance is needed, if not as a substitute for, then as the complement of, insurance. In fine, assistance has a necessary place in any complete national provision for unemployment. The Unemployment Provision Recommendation makes it clear that the ideal to be aimed at is compulsory insurance, together with a complementary assistance scheme.

As might be expected, therefore, the distinction made between the insurance " benefit " and the assistance " allowance " is reduced to a minimum in the Unemployment Provision Convention. It is laid down that the " allowance " must not be " a grant under the ordinary arrangements for the relief of destitution " ; it must be accorded as a right, with the possibility of appeal to a tribunal. By analogy with the qualifying period of contribution ordinarily imposed for the grant of " benefit," a qualifying period of employment may be required for the grant of an allowance. The only essential distinctions are that the need of the claimant cannot be made a condition for the award of " benefit," but can be made a condition for the award of an " allowance " ; and that " benefit " must be paid in cash while " allowances " may be paid in kind.

Summing up the indications which have been drawn from the policies established by the International Labour Conference for the promotion of social security, one must conclude that the security of the employed classes against the various risks which threaten the livelihood of themselves and their dependants is to be provided preferably, but not in every case exclusively, by means of social insurance.

A public medical service of which insured persons may avail themselves as of right (a condition which, in their case, perhaps excludes the application of a means test) is admitted as a substitute for an insurance medical service, at least for the purposes of maternity care and as regards persons covered by pension insurance. It seems likely that the equivalent of a

public medical service which imposed no means test would, by interpretation, also be recognized for the purposes of workmen's compensation and sickness insurance : the question has not been judicially decided.

The Conventions on pension insurance accord reluctant recognition to non-contributory pensions. These pensions are placed on quite a different plane from poor relief, and, although there is a means test, means must be exempted up to a certain level. That such pensions might have an essential part to play in meeting cases of need which insurance could not provide for was stated in the quoted resolution of the Havana Conference.

The Unemployment Provision Convention requires that the standards to be attained by unemployment assistance should be practically the same as those laid down for unemployment insurance, but for the application of the means test.

In a word, therefore, social assistance as a means of social security must be distinct from poor relief, must be accorded as of right and its benefits for those without means must meet the necessity of the case.

Social Security : The Merging of Insurance and Assistance.—All the "social risks"—incapacity for work, inability to find work, need for medical care, abnormal or even normal family charges—can be covered by either social insurance or social assistance. The segregation of risks of occupational origin is conditional upon the assignment of liability for them to the employer : otherwise there could be no justification for special benefits in respect of these risks. The distribution of the other social risks between insurance and assistance varies from one country to another and in the same country from time to time, but some general tendencies can nevertheless be observed. Short term cash benefits are commonly provided by insurance, and likewise medical care for the generality of diseases. Social assistance will sometimes be the method of providing pensions, but its most characteristic responsibilities are the treatment of mental illness, tuberculosis, and venereal diseases, and the welfare of mothers and young children—responsibilities of obvious import to society and which may well be discharged by means of non-contributory benefits without fear of generating abuse. The predominant method of affording social security is nevertheless by means of insurance, covering the employed class, and so, in industrial countries, the mass of the occupied population. Social assistance plays a subsidiary part, caring for persons who are outside the protection of insurance or supplementing insurance benefits which are insufficient. The discussion in the following paragraphs, however, is not concerned with the sharing of functions between insurance and assistance schemes, but with the tendency of the two types to coalesce.

Social insurance and social assistance are intermediate forms between the extremes of private insurance and poor relief. For the immediate purpose, social insurance may be characterized as the method which provides benefits of a probable value at least equivalent to the personal contributions of the individual entering insurance early in life, and social assistance as that which provides benefits determined by the need of the applicant from whom no specific contribution is required. The thesis which it is desired to illustrate, very briefly, is that social insurance and social assistance are approaching one another from opposite starting points, each assuming features proper to the other until they meet, as it were, in the centre and merge.

Insurance is certainly the predominant method of affording social security. It has intrinsic methods which are peculiar to it and will always recommend it to governments and peoples. But its grand advantage is that it is financially feasible where assistance is not. By a most fortunate coincidence the bulk of the low income group is comprised within the class of wage-earners, from whom contributions can easily be collected through the employer, while the latter can be made to contribute as well. This ready source of revenue has always been the envy of social assistance.

But social insurance has long been subject to limitations, which are the defects of its qualities and have been thought to be inherent in it. These limitations consist in the restriction of its scope to employed persons and in the more or less close dependence of the benefits of an individual upon the contributions credited to him: they are, however, being transcended.

Since the world economic depression, wherein the savings of countless persons disappeared, social insurance in several countries has begun to reach out to the independent workers, who have come to desire the protection of pension insurance especially. Among the most recent instances besides the voluntary scheme for "black coats" in Great Britain, are the extension of compulsory pension insurance to independent craftsmen in Germany (1939), compulsory pension insurance for craftsmen and peasants in Bulgaria (1941), and the obligation (Uruguay, 1941) or option (Brazil) for employers to insure themselves under the same pension scheme as their employees. The extension of social insurance beyond the ranks of employed persons encounters the new problem of collecting contributions, before which most countries still hesitate. Sweden, Finland and, using other methods, Denmark have adopted social insurance schemes truly national in scope, and covering the whole population. New Zealand, travelling by a different road, has attained the same objective. The Social Security Board of the United States is also considering the possibility of including independent workers in the Federal pension insurance scheme. There are signs, therefore, that the scope of social insurance is extending towards universality, and this tendency is likely to be strengthened in the economic circumstances of the post-war world.

The strict proportionality of benefits to contributions which is the rule in private insurance has been mitigated in social insurance from its very inception by consideration for the family responsibilities of insured persons and by the principle that the cash benefits of insurance should, as far as possible, be sufficient in themselves for maintenance. It is the application of these policies which confer upon social insurance benefits their distinctive character. The fact that the employer and, especially in pension insurance, the State are contributors as well as the insured person makes it possible to augment in varying amounts, according to the presumptive need of the beneficiary, the benefits to which his own contributions would equitably entitle him. In the British health insurance scheme, it would seem, the individual is credited personally, at least in theory, with his employer's contribution as well as his own, but in other countries part of the employer's contribution is used to supplement the benefits of the needier individuals. The State subsidy has always been explicitly devoted to the guarantee of a minimum benefit or used to help in some other way the needier cases. The means test, involving inquiries into the affairs of the claimant, is quite foreign to the conception of social insurance. The principle that public subsidies should not be paid to individuals except in

need is represented in social insurance by the rule, commonly observed, that the State subsidizes only those insurance schemes the scope of which is confined to manual workers or to workers of limited earnings, that is to say, to classes whose needs can be inferred without investigation. Nevertheless, a few instances are to be found of means tests (though with liberal exemptions) within the framework of pension insurance, notably in Sweden, Belgium and France—when the insured person demands some "uncovenanted" pension, to which his own or the joint contribution would not in equity entitle him.

Benefits in respect of family responsibilities and guaranteed minimum benefits are clearly in the nature of assistance. Such benefits have shown a constant tendency to increase in importance in comparison with those which are proportional to the rate and duration of the contributions of the insured or of the joint contributions. We find in most countries family medical benefit, dependants' supplements added to periodical payments in respect of sickness, invalidity, old age, accident and unemployment, not to speak of the purely family nature of maternity benefits, survivors' pensions and, finally, of family allowances. Dependants' supplements have appeared even in workmen's compensation schemes of the employer's liability type.

It is in pension insurance that the assistance element bulks most largely, for without it the scheme cannot provide adequate pensions until many years have elapsed. When the scheme is introduced, there is the problem of those who have already attained the pensionable age, and for whom pure social assistance through non-contributory pensions is the only remedy, and there is also the problem of those who are elderly, whose contributions cannot build up an adequate pension in the years of activity that remain to them, and for whom a supplementary pension must be provided, either from a State subsidy or by drawing on the employers' contributions. If the scope of the scheme is limited, say, to wage-earners, there will be a small but continuous influx of elderly entrants who will require subsidizing.

One might suppose, however, that a pension insurance scheme, national in its scope, would, after the elimination of the original elderly group, become self-supporting in the sense that each individual would contribute in the course of his life enough to buy him an adequate annuity. In a national scheme, however, there are no employers' contributions, and it might not be expedient to require the lowest wage group to pay entirely for its pensions. A pension insurance scheme applied to the whole population, or even one applied to the whole employed class, which was designed within a generation to provide benefits sufficient for maintenance by accumulating contributions would build up reserves of unmanageable magnitude. The question then arises how can a nation save for its old age? What is true for a limited group may not be so for a whole community which cannot store up claims against itself. A little reflection shows that the ability of a nation to bear increasing pension charges depends solely on its increasing productivity. It would be necessary, in order that the national scheme should be able to fulfil its engagements in fact as well as in form, that its contribution reserves should be invested in such a way as to yield increased output corresponding to the expected interest thereon. To attain this result may not be beyond the wit of men, but in our economy and with our experience we ought not to rely upon attaining it. Pensions built up on the accumulation system are promised

as a specified amount of money, not of purchasing power. But our epoch has seen violent fluctuations, on the whole upwards, in the level of prices so that there can be no assurance that a pension laboriously built up over a lifetime will not have lost its purchasing power when the time comes to draw it. Another reason for prudence in accepting distant pension obligations is the likelihood of a considerable increase in the number of aged persons in the population. These were among the considerations which led Great Britain to finance contributory pensions, from the outset, on a modified assessment system, and Sweden (1935) and the United States (1939) to substitute that system for the accumulation or reserve system on which their pension insurance was originally designed to work. The death blow has been dealt to the accumulation system, in Europe at all events, by the disappearance into the smoke of battle of the reserves of pension insurance largely invested in government securities. No wonder Germany has now declared that such a system was a mistake (however convenient to the government at the time) and is to be abandoned, while France abandoned it a few months ago.

It might be concluded that national or quasi-national pension insurance schemes would therefore have to content themselves with uniform pensions, financed on the assessment system. This policy, first adopted in Great Britain, is being followed in Spain (1939) and Bulgaria (1941). But uniform pensions can at best guarantee a minimum of subsistence, and take no account of the differences in standards of living which will always persist in some degree. It is still possible to hope that scientific progress will in the future, as in the past, bring about a secular increase in productivity. So a pension insurance scheme may still leave room for a modest growth of the average pension over a long period of years. Such a compromise between the uniform pension and the annuity purchased with accumulated contributions is to be found, for example, in Sweden and the United States. In Chile, where the currency for many years has shown a constant tendency to depreciate and which had a quasi-national old-age pension insurance scheme, the government is proposing to abolish the accumulation system of old-age pensions, and to introduce invalidity, old-age and survivors' pensions, the basis and main part of which, financed out of general taxation, will be related to the level of wages recently earned by the pensioner on the one hand, and to the current general level of wages on the other, in such a way as to guarantee a minimum amount of purchasing power. This original proposal seems worthy of serious attention in other countries.

A pension insurance scheme which approaches universality in its scope, whose essential benefit is on a subsistence level, which is largely financed by a State subsidy, and which may even require a means test for certain supplements, comes to resemble very closely a social assistance scheme. Of this type is the British contributory pension scheme and the social security scheme of New Zealand. It is significant that both these schemes have developed out of old-established schemes of non-contributory pensions. The rising cost of non-contributory pensions ultimately compels a country to find new means of financing them and so they are converted into contributory pensions. The conversion, however, was carried out in a very different manner in the two countries respectively.

The British scheme abolished the means test, retained, though at its maximum, the old rate of pension and imposed a joint contribution sufficient ultimately to finance the pension entirely in the case of young

entrants, the huge deficit in respect of older entrants being borne by the State ; but now the means test has been reintroduced in connexion with the guarantee of a subsistence pension.

In the New Zealand scheme pensions are but part of a grandiose complex of benefits for the whole population. Old-age pensions were introduced in 1898, and widows' pensions in 1911, while in the last few years unemployment assistance and family allowances have been added ; all these benefits were on a non-contributory basis. But in 1930, in order to finance unemployment assistance, a special national tax was instituted. The next and final step was to group all these non-contributory benefits together, and to add sickness benefit, an " emergency " benefit to meet all cases not otherwise provided for, and a complete medical service, so constituting a comprehensive system of social security. To finance the new benefits added in 1938, a special income tax of 2*s.* in the £ was imposed, but the existing charge on the national budget was maintained. Most of the cash benefits are granted subject to a means test, but with very ample exemptions. The contribution does not appear to bear any theoretical relation to the benefits, but it is obvious that, except for the well-to-do who might be affected by the means test, every contributor is likely to get more than a full return for his contribution.

The trend in social security thus seems to be towards a closer blending of social assistance with social insurance, in a compound scheme exhibiting marked features of either element ; it is likely to be reinforced in the circumstances of the post-war world. Such a scheme, approaching universality in its scope, levies contributions as a financial expedient affording a sure source of revenue, and also as a public lesson in financial responsibility, and it is concerned to provide benefits, related perhaps in some degree to the contribution of the individual, but mainly determined by a criterion of social adequacy, which takes account of personal need.

COMPARATIVE LAW AS A FACTOR IN ENGLISH LEGAL EDUCATION.

[*Contributed by* H. C. GUTTERIDGE, ESQ., K.C., LL.D.]

THE importance of comparative studies as an element in legal education was underlined in the recent report of the American Bar Association's Committee on International and Comparative Law [1] and certain measures were suggested as likely to be of practical value in promoting the employment of comparison as an instrument for the teaching of the principles of the Common Law.

In these circumstances it appears to be desirable that English lawyers should also take stock of the position as it affects them. It is true that legal education has developed differently on the two sides of the Atlantic but the objective in each case is the teaching of Common Law principles and the issues which arise are to a large extent identical. In any event it cannot fail to be of advantage to each of the two systems concerned to be kept informed of the measures taken by the other, of the difficulties to be overcome and of the experience which has been gained.

A comparative lawyer of great distinction has described the position in the British Isles, when contrasted with what has been done abroad, as "shocking." [2] This is a strong term to use but it is not without justification. There is at the moment of writing no Chair of Comparative Law in the British Universities. The Chair of Historical and Comparative Jurisprudence, established at Oxford in 1869, is still—as it has, in reality, always been—devoted primarily to the general theory of the law. The Chair of Comparative Law at Cambridge has lapsed owing to the fact that it was only created for a single tenure and the holder has attained the limit for retirement under the Statutes of the University. The Quain Chair of Comparative and Historical Law at University College, London, has, in effect, been suppressed. Very little is left of the effort made in England [3] over a period of rather more than seventy years to find a place for the comparative method in the teaching of the law. All that remains is a Readership in Jurisprudence at Manchester and a Lectureship in the same subject at University College, London; these are associated with Comparative Law though only as a subsidiary subject.

The failure of Comparative Law to secure wider recognition in the field of legal education arises, in the first instance, from causes which have no relation to its educational merits or demerits. The curricula of the University Law Faculties and the Professional Law Schools are so tightly packed with subjects for examination that a latecomer such

[1] 26 *American Bar Association Journal*, p. 115; Jour. Comp. Leg. 3rd Series, Vol. 23, p. 60.

[2] Lee, *Comparative Law and Comparative Lawyers*, Journal of the Society of Public Teachers of Law, (1936) p. 5.

[3] As regards Scotland, see Gardner, *Study of Comparative Law in Great Britain*, Jour. Comp. Leg. 3rd Series, Vol. 14, p. 201.

as Comparative Law must almost inevitably be excluded. The burden placed on the back of the student is quite as much as he can bear and the tendency seems to be in the direction of the narrowing rather than the widening of curricula. The crux of the matter is that "Law" is a vast field of study with many aspects some of which are what is known as "cultural" whilst the others are "vocational." The Universities and the Professional Law Schools have not, as yet, been able to come to terms with regard to the parcelling out of the territory between them. They are competitors and the result has been that the Law Faculties seek to escape from the accusation that their teaching is purely theoretical whilst the Professional Bodies strive to avoid the charge that they only produce technicians, not scholars. For this reason a legal curriculum in England tends to develop into a jumble of cultural and vocational subjects often combined with a system of "options" which may lead to such strange results as the possibility that a student may submit himself for examination in Equity without knowing the Law of Property and *vice versa*. It goes without saying that cultural subjects, unless they are compulsory, are apt to be evaded by the average student, sometimes because he finds them difficult, but usually because he is doubtful of their value to him in his subsequent career as a practitioner. It is not a matter for surprise, therefore, that comparative law has so far been unable to gain more than a very modest footing for itself. An unfortunate consequence of this situation is that it has proved to be impossible to test the value of comparative instruction except to a very limited extent; its potentialities are thus, in a large measure, a matter of speculation.

For present purposes the question at issue must be examined in the light of the requirements of each of the three departments into which the study of the law is conventionally divided, namely, (*a*) undergraduate instruction, (*b*) postgraduate study, and (*c*) research. It is clear that different considerations must apply to each of these departments of study, because the circumstances in which the student carries out his task vary very widely in each instance. There are, however, certain problems which are common to all three departments of study and it may be profitable to examine these in the first instance before proceeding to discuss the matter as it arises in each individual case.

The Language Problem.—How far is a knowledge of languages essential to a course of comparative study? The linguistic problem is the most obvious of the many difficulties which must be overcome and there is no doubt that it often acts as a deterrent to comparative study. It is, usually, the first question to be raised by a would-be comparative student and it is one which does not admit of a ready answer. Its importance is often exaggerated because a great deal of valuable comparative work can be done by a person who is in no sense of the word a linguist. It is, of course, true that certain types of comparative study can only be undertaken by those who have the gift of tongues. There are, for instance, aspects of comparative commercial law which cannot be pursued with profit without a knowledge of the principal European languages. On the other hand, it is possible to make a comparative study of the laws of England and those of other countries such as Scotland, the Dominions, India [1] and the United States without any

[1] There are gratifying signs of increased interest in comparative studies so far as the Indian Law Schools are concerned.

linguistic trouble other than that resulting from possible differences in legal terminology. Quite apart from this it is feasible to reduce the problem almost to vanishing point by confining the comparison to two systems of law as in the case of English and Roman Law or English Law and the French Civil Code. In other words: although the impediment of language may in certain circumstances prove to be a very serious obstacle it cannot, standing alone, be regarded as a bar to comparative work.

The language problem is most in evidence in the domain of post-graduate study and research. In the case of the more simple or elementary forms of comparative study it assumes relatively slight proportions. So far as research is concerned, the remedy for the language difficulty, if one be needed, would seem to lie in the direction of "team work," but this is a matter which will be discussed later.

The Materials for Comparative Study.—The most serious handicap imposed on comparative study in England lies in the paucity of suitable books and in the difficulty sometimes experienced in obtaining access to such of them as are available. This obstacle, combined with the language problem, has done much to discourage the use of the comparative method, but there is no reason to think that it constitutes an impediment which cannot be removed.

There are already a few introductory books which will help the beginner. Amos and Walton's *Introduction to French Law*, Lee's *Introduction to Roman-Dutch Law* and Buckland and McNair's *Roman Law and Common Law* fall into this category, though the last-mentioned work presupposes an intimate knowledge of both systems which is not possessed by everyone. Schuster's *Principles of German Civil Law* and Williams' *Swiss Civil Code* are hardly suited to novices and are, moreover, to a large extent obsolete. Burge's famous treatise on *Colonial and Foreign Law* in its modern garb [1] is incomplete and largely out of date. Certain other very useful works such as Walton's *Egyptian Law of Obligations* are intended for specialists rather than the general reader. The beginner is in fact ill-provided with text-books and unless he is a linguist of some ability is often left to struggle along as best he can with the aid of such snippets of information as can be extracted from the foreign codes and other sources.

As regards Scots Law: the excellent institutional works which exist give great scope for comparative study to this particular subject and there is, of course, no language barrier to be surmounted. Scots Law in many respects furnishes the most valuable training ground in comparative methods for the English law student, but it is doubtful whether the contrast between its rules and those of the Common Law is sufficiently marked to stimulate the interest of the student. The American Restatements published by the American Law Institute [2] have opened the way to a quickening of knowledge in American Law on this side of the Atlantic and to a closer appreciation of the divergencies between our law and that of the United States. As in the case of the laws of the British Empire the similarity of principle and of language between English and

[1] New Edition (1907–1928).

[2] The Restatements of main interest to English lawyers are those which deal with the law of Contract Agency, Torts, Conflict of Laws, Property Trusts and Restitution.

American law enables comparative studies to be pursued without the aid of introductory manuals provided that the other materials are available. The problem of text-books for the beginner is, however, a real one in the case of most foreign systems of law and one can only hope that it may be overcome eventually by the publication of more introductory manuals. Treatises of this kind could be most suitably produced by team work between an English comparative lawyer and a foreign colleague since it is only possible in this way to steer clear of the danger, on the one hand, that the foreign law may be misunderstood and, on the other hand, that the subject may be presented to an English student in a way which is unattractive or perhaps even unintelligible to him. In a work of this kind it is essential that the legal mentalities of the two systems should be focused on the point at which they impinge on one another and this is a task which calls for collaboration.

If we pass from the requirements of the novice to those of persons engaged in postgraduate study or in comparative research the situation is somewhat discouraging owing to the difficulty of securing the necessary materials. This means that unless the student has the means and the time to travel in search of them he will, at the very least, be seriously hindered in his work and may even be compelled to abandon it. A distinction must be drawn in this respect between research into the law of the British Empire or the United States and the study of rules of the civil law countries. In the case of the first-mentioned systems the obstacles are not so grave though they are sufficiently disconcerting to invite the attention of the authorities responsible for the upkeep of the English law libraries. There is not only a dearth of books on Imperial and American Law but much of the material which is available is out of date. There is room in this direction for the benevolence of those who have at heart the promotion of closer cultural relationships between the English-speaking nations. The meagre endowment of legal research in England is mainly responsible for this state of affairs as the resources of most of our libraries are, in the financial sense, almost entirely absorbed by the purchase of the necessary English law books. It is no doubt true that a diligent search in the libraries of the Dominion and Colonial Offices and the Inns of Court might bring to light the greater part of the Statute Law and the Law Reports of the British Overseas Possessions, but there is a scarcity of text-books and legal periodicals which makes it extremely difficult for an English lawyer to keep in touch with developments in the rest of the Empire. Mr. Justice Greenshields, of the Quebec Bench, in his address to the Conference of the Universities of the Empire held at Cambridge in 1932, called attention to this matter and to the difficulty which it might place in the way of the argument of appeals to the Privy Council. In any event the position is one which does not reflect credit on this country, more especially when regard is had to the fact that all this material is available in the principal law libraries of the United States.

In the case of American law books the situation is also unsatisfactory. There is a complete run of the Federal and the State Reports in the library of the Middle Temple [1] which has been placed there by the generous action of American lawyers who have always regarded this as the one of the Inns of Court with which they have the closest ties. Some of the American Law Reviews, but not all, are available, whilst the

[1] This was written before the tragic and senseless destruction of the Library Building by enemy action.

leading American text-books are very poorly represented on the shelves of our libraries.

When we turn to foreign law, in the wider sense of the term, the position is even less encouraging though it furnishes no ground for thinking that research is rendered impossible. The main repositories of these books are the Library of the Foreign Office, the Squire Law Library at Cambridge and the Schuster Library of Comparative Law at the London School of Economics.[1] If the researcher has the time to explore the contents of these libraries he will find that he can in one place or the other procure access to the principal French, German and Italian text-books, and collections of statutes and law reports. Whether he is likely to discover anything beyond this is a matter for speculation.

The most up-to-date of these collections is, probably, that in the Squire Law Library at Cambridge which houses some 2,000 foreign law books, the great majority of which have been purchased recently. There are still some serious gaps in this collection, but according to the testimony of foreign lawyers, by whom it has been inspected, it may be described as containing a reasonable minimum of the materials required by comparative students. It is strongest in books on the law of obligations and private international law to which particular attention has been directed and contains items such as the Swiss Law Reports and certain foreign legal periodicals which are not obtainable elsewhere in England at present. Next to it ranks the library bequeathed to the Society of Comparative Legislation by the late Dr. Schuster and transferred to the London School of Economics.

The general result is that if one looks long enough and hard enough it is possible to obtain the more important books of the principal law systems, but the question which leaps to one's mind is why a person engaged in research should be compelled to indulge in this waste of time and effort? In any event it is clear that the facilities available in England are far inferior to those to be found, for instance, in the Harvard Law Library or in the library of the Kaiser Wilhelm's Stiftung at Berlin. Moreover, the distribution of existing books over a wide area in England without any attempt being made to indicate their location and the absence of any real systematic effort to keep some of the collections up to date is a reproach to English legal scholarship. It is well that this issue should be faced squarely because it is more than doubtful whether any very marked progress can be made in comparative studies in this country until some steps are taken to remedy this unfortunate situation.

Much can be done by putting existing resources to the best use. In the first place effect could be given to the strong recommendation of the Atkin Committee on Legal Education that a special committee should be formed to co-ordinate the activities of the English law libraries and to secure "the pooling of their resources and the repair of deficiencies."[2] This report deals, in particular, with two important matters. First of all, attention is directed to the fact that "without recourse to each library it is difficult to ascertain where a book, absent from the one in

[1] At the moment of writing the Bodleian Library at Oxford is poorly provided with foreign law books, but there are grounds for the belief that steps will shortly be taken to remedy this state of affairs, in particular as regards American Law. A search in the Library of the British Museum sometimes brings foreign law books to light. See Pollock's note *Jour. Comp. Leg.* New Series. Vol. v. (1903), p. 85.

[2] Report of the Legal Education Committee. (1934) Cmd. 4663.

which the student is working, is to be found. Printed catalogues in some cases exist, but they are not up to date. It is unfortunate that the wealth of material should not be made more easily available to students and practitioners alike. We consider that one of the first steps in promoting legal research should be the formation of a central catalogue of the contents of the London Law Libraries."

A central catalogue of this kind is such an obvious solution of one of the great obstacles to legal research that it is somewhat surprising that nothing has yet been done in the matter, for the labour and expense would not be excessive, even if the central catalogue should—as is eminently desirable—be extended to the law libraries at Oxford and Cambridge. But further than this the Legal Education Committee also recommended that steps should be taken to secure "co-operation between the libraries and the pooling of their resources." The Committee pointed out that this applies chiefly in regard to Dominion and Colonial text-books and reports and important series connected with foreign law, but extends also "to all the material necessary for adequate research in comparative law, the most fruitful of all forms of legal research. To maintain a complete series of even all the colonial reports taxes the resources and the space of any law library. The states and provinces from which reports issue are very numerous, and it is probable that while one set should be reasonably available, it is not necessary for every library to have a complete series. Nor in fact do they, but there is no co-ordination, and duplicate sets from one colony might be found in some libraries, while reports from others are wholly lacking from all. "It would," say the Committee, "obviously be of advantage if some measure of agreement could be attained by which the provision of the text-books, statutes and reports of specific colonies could be undertaken by specific libraries, and if the same method could be applied to material for the study of foreign law." The Committee urged that the various library authorities should be called together to carry these suggestions into effect but, up to the present, the matter still rests where it was. It is possible that this state of suspense may be due to the fact that public attention has become concentrated on the main recommendation of the Committee for the establishment of an Institute of Legal Research in London, but it is to be regretted that no steps have been taken to give effect to a suggestion which could be carried out without in any way prejudicing other issues.

The creation of an Institute of Legal Research would, no doubt, involve the building up of a library of Comparative Law as an annexe to the Institute, and the question therefore presents itself of the policy which should be pursued in carrying out a scheme for the establishment of a collection of foreign law books in an English environment. To begin with, we may stress the undesirability of piling up a vast and indiscriminate assortment of books purchased at random from book-sellers' catalogues. No library can afford to give unlimited space to foreign law books and a process of selection, therefore, becomes inevitable. This process will, broadly speaking, be governed by the following considerations: first of all, what is the geographical area to be covered? Is an attempt to be made to cover the law of all countries or only that of certain selected countries? Secondly, is the collection to be of a general character and to cover every aspect of law or is it to be confined to certain topics? Lastly, is any restriction to be imposed on the type of

law book to be admitted to the shelves? These are, in outline, the questions to be decided.

Theoretically, a collection of foreign law books should, no doubt, cover the whole field of law, but, in practice, the wisdom of such a policy is open to question. Quite apart from the difficulties of a financial or administrative order which it would create, it would result in an accumulation of a mass of obsolete or obsolescent law unless an almost super-human degree of vigilance is exercised. An attempt might be made to maintain a complete collection of codified law and to keep it up to date, but this policy can be criticized on the ground that rules of law are apt to mislead unless they can be read against a background of their interpretation by the national judges and the criticism of legal authors. There appears to be little doubt that some selection is imperative and, in this connexion, it should be remembered that the importance of a system of law to a comparative lawyer may have little to do with the political or economic importance of the country to which the system belongs. Swiss law is, for instance, in many ways the most instructive and interesting of the modern systems. It may be added that no useful purpose seems to be served, as a rule, by the acquisition of books in languages which no one using the library is likely to understand.

The second question, namely, whether a library of comparative law should be confined to certain legal topics, is an aspect of a major problem, *i.e.*, of the extent to which comparative study and research can be pursued with profit. It will be sufficient to say that the library policy must be adjusted to the general policy which is followed by the institution of which the library forms part.

The last question, namely, the choice of books within the predetermined categories is, probably, the one which, in practice, tends to give rise to the most serious difficulty. The volume of legal literature published annually in foreign countries is such as to beggar all description. One example will suffice: in the United States alone over 62,000 statutes were passed during the five years preceding the Great War, 1914–1918, and during the same period over 65,000 decisions were included in the printed volumes of American reports.[1] In 1933 the American law reviews alone numbered more than 600 volumes[2] whilst from every quarter in Europe statutes, law reports, legal periodicals, text-books, theses and monographs come pouring from the press in a never-ceasing stream. It is quite impossible for an English comparative lawyer to find his way amid this impenetrable jungle of paper and ink and he must rely on such expert advice as he can obtain from abroad and on book reviews. The very greatest care is necessary, therefore, in the purchase of treatises or other books on foreign law and it is well to act on the presumption that any particular book, which is not obviously important, is not needed. This is more especially the case as regards the doctorate theses which are published on the Continent in vast numbers in order to comply with University regulations. Some of these dissertations are valuable, and no work should be rejected solely because it

[1] *Ex relatione* Elihu Root in presenting the report which led to the foundation of the American Law Institute (*The American Law Institute*, by Hessel E. Yntema in Legal Essays in tribute to *Orrin Kip McMurray* at pp. 664–5).

[2] This figure is taken from the Introduction to *Selected Readings in the Law of Contract*, published by the Association of American Law Schools.

happens to fall within this category, but the great bulk of this material can be disregarded. Legal periodicals published abroad also furnish a serious problem because, although they are, generally speaking, of great value to the researcher, they are apt to be looked upon askance by the librarian who sees in them an ever-increasing demand on available shelf room, a constant drain on income owing to the renewal of subscriptions and a *damnosa haereditas* in the shape of the necessity of constantly recurring expense for binding. But it is desirable to include as many of these periodicals in a collection as is reasonably possible because they furnish one of the best means available of keeping in touch with developments abroad. Here again, the question of the languages in which they are published is an important element to be taken into account.

The difficulties and problems with which we have been dealing are of a formidable character. So far as they are financial or administrative in character they must be solved by the authorities of the learned bodies charged with the promotion of legal research in England, and much might be done in certain directions if effect were given to the recommendations of the Legal Education Committee.[1] The matter of providing access to information on current changes in the law is, however, one which has an international aspect and is of great importance to all the countries concerned. Valuable work in disseminating information is done by certain learned societies,[2] but they are handicapped, as a rule, by the fact that they are in much the same position as the individual student or researcher, and have to obtain their material indirectly instead of being in a position to demand it as of right from the governments concerned. There is thus in some cases very considerable " time lag " in making the information available. A question which will undoubtedly arise in the future is whether the governments of the world should not be asked to give the same assistance to legal as they already do to medical research, and one of the services which they might very appropriately render would be the establishment of an international centre for the collection and distribution of information as to current changes in the law of all countries.[3] It is only in this way that comparative study and research can be freed from its greatest bugbear at present, namely, the difficulty in discovering the exact state of the law of a country at any given moment.

[1] The establishment of the proposed Institute of Legal Research would be of great value in this connexion. The Institute would be able to get into touch with similar bodies abroad and to act to some extent as a clearing-house of information as to changes in the law. It would, in a measure, be able to discharge the functions of the French Government Bureau of Foreign Legislation. But, immediately, the most important need is for some degree of co-ordination of the existing library facilities in England.

[2] The Society of Comparative Legislation publishes an annual survey of the legislation of the British Empire and the United States. Other useful publications are the *Annuaire de Législation* of the Société de Législation Comparée, the *Annuario di Diritto Comparato* issued by the Instituto di Studi Legislativi under the editorship of Professor Galgamo, the *Revue de Droit Maritime* and the *Bulletin of the International Juridical Institute.*

[3] Action of this nature was foreshadowed in the third recommendation of the Final Act of the International Conference on Bills of Exchange held at Geneva in 1930 : " The Conference further recommends that the Parties to the Convention providing Uniform Law for Bills of Exchange and Promissory Notes should communicate to one another the text of the most important judgments given in their respective territories coming under the application of the said Convention." League of Nations Series II. Economic & Financial, 1931, II, B.2.

Comparative Law as an Undergraduate Subject.—It is generally assumed that comparative law is an unsuitable subject for students in the earlier stage of their apprenticeship to the law and there are many cogent arguments in favour of this view. The difficulties involved are manifold and obvious ; some of them are educational, others are connected with the administrative machinery of law schools. All are, however, of a serious character, and if comparative law can be introduced at all into elementary legal education, it seems clear that this can only be done in a very tentative form and to a limited extent. A scrutiny of the syllabus of any one of the elementary examinations in law is sufficient to afford convincing evidence of the very serious practical difficulties which attend any attempt to widen the scope of the teaching and examination to which the syllabus is related.

Nevertheless it does not appear that the use of the comparative method in elementary legal instruction is either inherently impracticable or undesirable. There is no need to elevate comparative law to the dignity of a separate subject, with its own lectures, teachers and examination papers. It should be perfectly feasible to dovetail comparative instruction into one of the courses devoted either to the usual English law subjects, or, perhaps, to one of the cultural subjects, such as Jurisprudence or Conflict of Laws. A compact topic within the subject could be selected and treated comparatively and the comparison could be limited to English law and one other system of law, preferably Scots law, Roman law, or the French Civil Code.[1] " Offers and acceptance " could, for instance, be dealt with in this way within the four walls of a course on the English law of contract without imposing any undue strain on the teacher or his pupils. In the hands of a competent instructor two —or, at the most, three—lectures along these lines would arouse the interest of the student and stir him up to think for himself. Law teachers are only too familiar with the type of student who accepts a rule of law as axiomatic and is content to memorize it without stopping to consider why the rule was brought into existence, what it was designed to achieve and whether it is the only just and reasonable solution of the problem in human affairs to which it relates. Maine observed that " the student who has completed his professional studies is not unnaturally apt to believe in the necessity, and even in the sacredness, of all the technical rules which he has enabled himself to command," [2] and this is as true of our students to-day as it was of those contemplated by Maine more than sixty years ago.

There is another argument frequently advanced against the use of the comparative method in legal instruction. It is said that it becomes superfluous because the element of comparison is already provided for by the inclusion of Roman Law as well as English Law in courses leading to a first degree. This is an argument which would carry very considerable weight if it were not for the fact that Roman law is not always a compulsory subject and that, in any event, the average student is not likely to indulge in comparison unless he is encouraged to do so by his teachers or examiners.

The suggestion is sometimes made that comparison may have the

[1] An experiment of this kind seems to have been made in the paper on the Digest in the Honour School of Jurisprudence at Oxford. See Lee, in Journal of the S.P.T.L. (1936), at p. 7.

[2] Maine, *Village Communities*, p. 6.

effect of creating confusion in a student's mind. This is an objection which does not appear to rest on solid grounds. In the first place, if there is any substance in the suggestion, it should operate equally—and perhaps even with greater force—to exclude the teaching of Roman law. Secondly, provided that the topic for comparison is selected with due care, its effect, far from creating confusion, should be to impress the relevant rules of English Law more clearly on the student's mind. He will see them projected against a background of another system of law and therefore in stronger relief than is the case when they are presented to him in an axiomatic form. Foreign travel is usually regarded as possessing high cultural value, and it is difficult to see why an occasional and reasonably limited excursion by teachers and pupils into the territory of foreign law should not prove to be of equal benefit to both.

There are grounds for the belief that experiments made with elementary comparative teaching, on the lines indicated, have met with considerable success.[1] The language problem is not likely to arise because, if the comparison is limited to English and either Roman Law, Scots Law or the French Civil Code, such elementary teaching need not call for a greater knowledge of languages than that possessed by the average law student. Roman Law undoubtedly lends itself well to comparison with certain aspects of English Law, but there is much to be said in favour of extending the comparison to modern civil law. University students are apt to look on Roman Law as "dead" law and feel that they have had as much of it as they can stomach by the time at which they are required to turn to the study of English Law. Their interest in Roman Law might, in fact, revive if they were shown how a modern civil law system seeks to adapt the Roman principles and rules to the requirements of present-day society.

It would be idle to attempt to disguise the existence of certain practical difficulties which lie in the way of the adoption of the proposals which have been outlined. The text-book problem arises, but such works as Buckland and McNair's *Roman Law and Common Law* and Walton and Amos's *Introduction to French Law* will go far towards meeting the difficulty and it is to be hoped that other works of this kind will make their appearance when the need for them is recognized. A more serious matter is the relative scarcity of teachers who would be competent or willing to give some of their instruction on comparative lines. It is not to be expected that law teachers will, in existing conditions, be prepared to equip themselves in large numbers as comparative lawyers ; the subject does not at present offer much opportunity of a livelihood or of academic or professional distinction. But this problem should not be treated as insoluble, especially as there are now in this country many scholars from foreign lands whose services could be utilized in this direction. Moreover, if postgraduate study and research should develop, as appears probable, along comparative lines, the teaching strength available for this particular purpose would be materially increased.

The Postgraduate Study of Comparative Law.—The term "post-

[1] *Ex relatione*, Professor Goodhart, Mr. F. H. Lawson and Mr. Wortley. See also *Report on Comparative Law*, 1939, by the Society of Public Teachers of Law, *Jour. Comp. Leg.* 3rd Series, xxii, p. 74. The regulations for the optional paper in Scots Law of Contract and Reparation in Part II of the Law Tripos at Cambridge make definite provision for the comparison of the relevant rules of English and Scots Law.

graduate " is commonly used to indicate that type of legal study which is undertaken by students who have already obtained either a professional qualification or a first degree in law. Many of them desire to widen their knowledge but are unable or unwilling to embark upon a course of research either because they have not the necessary leisure or because they do not feel themselves competent to undertake a task of such difficulty.

This particular sphere of legal education seems to be well adapted to the employment of comparative methods of study. The students concerned may be presumed to be mature and to have acquired a sound knowledge of the principles of their own law and a certain acquaintance with some of its more detailed aspects. The administrative difficulties which arise in the case of undergraduate or elementary study are mostly absent or assume a less acute form. There is much less difficulty in regard to lecture timetables or to the provision of the necessary instruction. At least two Universities, Cambridge and London, have definitely adopted the policy of making comparative law one of the subjects for their postgraduate degrees. In the case of the Cambridge LL.B. degree all students, with certain exceptions of a special and limited character, must pass in a paper on the comparative aspects of a selected subject in English and Roman Law.[1] Candidates for the London LL.M. degree who take Conflict of Laws must study the subject comparatively. There are good grounds for thinking that in both these cases the new venture has amply justified itself.

A restricted knowledge of languages and the scarcity of suitable books may create difficulty. These problems are, in effect, closely connected because, although the text-books are there, most of them are in foreign languages. This obstacle, however, is not insuperable, since a fair knowledge of Latin and French is all that is necessary in most cases. The language difficulty also disappears if the comparison is made between the English law and the law of Scotland or the British Dominions and the United States, though, oddly enough, the necessary text-books may in this event be even more difficult to procure in this country than French or German law books. It would seem, at first sight, as if the future of comparative legal instruction lies almost entirely within the sphere of study for a postgraduate degree, but the number of students who are prepared to enter upon a course of this kind is relatively small, and many of them are foreigners anxious to obtain an English law degree. If comparative instruction is to become an important element in legal education one may, perhaps, be permitted to doubt if much will be achieved until such instruction is able to find its way not only into the postgraduate but also into the undergraduate spheres of study, even if only in a tentative and restricted form.

The case of the foreign law student is of a somewhat special character. He cannot, as a rule, afford the time to obtain a first degree in English Law in the ordinary way. Most of these students can only spare one or, in rare cases, two years to the study of English law. The existing postgraduate courses of study are hardly suitable to them. The average foreign student can, of course, be examined over again in subjects which he has already studied abroad but he cannot be regarded as having a

[1] See Mr. Hanbury's Observations on this paper in Journal of S.P.T.L. (1931), p. 22.

knowledge of English law which will fit him for a postgraduate course. For this reason the University of Cambridge has instituted a Diploma in Comparative Legal Studies, which enables a student, with the approval of the Law Faculty, to select a subject for comparative study. He engages in a year's work under supervision and is required to submit a dissertation on his subject. This need not display originality, but must afford evidence of the fact that the candidate has made a serious study of that part of the law of England which bears on his subject. The outbreak of war has, for the time being, frustrated the development of this scheme and it is, therefore, not possible to say more than this—that it has proved to be an attraction to foreign students and has led to good work being done. The weekly Seminar in Comparative Law held at Cambridge has done much to encourage the study of foreign law and some published work of modest, though not negligible, character stands to its credit.

Research.—The problem of comparative research is closely bound up with the question of legal research in general. In certain authoritative quarters doubt has been expressed as to the value of legal research, except in the domain of legal history, jurisprudence, and public and private international law. This attitude towards research is based on a belief that the fundamental notions of law have assumed a definite form and that legal research tends consequently to degenerate into an over-elaboration of minor legal problems which are in some instances purely of academic interest and in others of no particular value either in promoting legal knowledge or in leading to the development or reform of the law. It is unwise to generalize on any question of this nature, but it would certainly seem that in the case of English law, there is very little room for academic research unless it is historical or is connected with legal philosophy or international problems. The fields of the Common Law and Equity have been ploughed up to such an extent that the area left for further cultivation is of a very limited description.[1] There are, it is true, certain departments of English law, such as commercial law, in which much research remains to be done, but the person described by Maine "as a learner who has just mastered his subject" is not, as a rule, qualified or equipped to undertake a task of this kind, which requires considerable experience of the working of the law and a certain familiarity with business practice. The result has been to create a condition of stagnation which is revealed by the very small number of Doctorates in Law which are being conferred, at present, by the English Universities.

What is the remedy for this state of affairs? The answer seems to be obvious. So far as research students are concerned, Comparative Law offers opportunities for creative work which can hardly be equalled. The territory which it covers is largely virgin soil, and the researcher, as a rule, runs very little risk that his discoveries may have been anticipated. The subjects for investigation are so numerous and varied that he will find little difficulty in selecting one which will enable him to engage in work which suits the bent of his mind and coincides with whatever plans he may have made for the future. Jurisprudentialists, Roman lawyers, legal historians, international lawyers, students of the

[1] Cf. Cohn, *Task and Organisation of Comparative Jurisprudence*, Juridical Review (1930), p. 134.

common law and equity and legal specialists of all kinds find that the employment of the comparative method opens up new avenues of research along which an escape can be found from stagnation. Comparative research also affords great opportunities for " team work " and may thus render possible the carrying out of investigations in circumstances of difficulty which would be a deterrent to individual research.

But comparative research, together with all other forms of legal research, suffers severely from the reluctance of graduates in law to enter on the task. The majority of English University law students are satisfied to obtain a first degree and the necessary qualification to practise in the branch of the legal professsion which they have chosen. It is only rarely that they are prepared to extend their University career beyond the period of three years which normally suffices for the acquisition of a degree in law. They are, moreover, actively discouraged from undertaking research by the attitude of the legal profession ; they are told that " the law "—by which is meant the practice of the law—" is a jealous mistress " and that they must never allow themselves to be diverted from their purely professional preoccupations by activities which do not operate directly to bring grist to the professional mill. Thus it comes about that the younger generation of our lawyers, particularly if they are members of the Bar, are made to feel that their careers may be jeopardized if they should be so unfortunate as to become known as theoretical rather than practical lawyers. The writing of a book which does not take the form of a practitioner's manual, severely practical in character and devoid of all literary flavour, is a highly dangerous adventure for the young barrister or solicitor.

This impediment, however, is not peculiar to comparative research ; it is created by the lack of co-ordination and collaboration which, unfortunately, still exists in England between the Profession and the Universities. The causes which underlie this phenomenon and the steps which could be taken to find a remedy are outside the scope of our present inquiry. Nor are we concerned with questions of university organization or administration because, apart from the vital matter of library facilities, there is no reason to believe that any permanent obstacles to comparative research exist in this connexion. The language problem, though it undoubtedly restricts the potential area of research, cannot, for reasons which have already been stated, be regarded as an insurmountable barrier. One of the most serious impediments lies in the scarcity of the materials obtainable in this country for comparative work in general, though this is a question which is mainly of a financial nature as the difficulty could be overcome by a relatively modest expenditure of money, which can only be regarded as prohibitive to the extent to which it might result in funds being diverted from other and more pressing needs of education and research. Further, the difficulties created by the shortage of materials could, in most cases, be overcome either wholly or in part by permitting and encouraging the researcher to travel in search of his materials and to study on the spot and with the help of experts the foreign aspects of the subject which he has chosen for investigation.

It is, however, undeniable that comparative research, unless it is merely of a descriptive nature, requires a very high degree of care, patience and industry. The difficulties which must be surmounted and the toil which is involved may be such as to daunt even the most able and best equipped

investigator. This has resulted in the adoption of " team work " for the carrying out of a great deal of recent comparative research. Team work is still in the experimental stages and has not yet been tried out to the full extent, but enough has been done to make it fairly clear that it will ultimately solve many of the problems which arise. It assumes several forms. An individual investigator may select his own collaborators ; or machinery for collective research may be created by the establishment of " Institutes of Comparative Law," such as those which have become very popular in the civil law countries. Some of these institutes are either official or semi-official in character, such as the Rome Institute for the Unification of Private Law, the Italian Institute of Legislative Studies, and the Berlin Institute for Foreign Law and Private International Law. Others are attached to Universities, such as the Institutes of Comparative Law in Paris and Lyons. In certain cases the work of an Institute may be carried on by a more or less permanent staff, but the University Institutes build up their teams from the general body of research students. In fact, the University Institute is often merely the outward symbol of the existence within the walls of the University of facilities for comparative research. The special type of Institute which enjoys official sanction and support is, as a rule, the more-efficient body ; it can command the services of trained and skilled personnel and is financially and materially better equipped. It is also more likely to be in a position to establish contacts with non-legal elements which may have to be consulted in order to secure the best results from comparative research of certain types, *e.g.*, government departments or professional or commercial bodies. On the other hand, it may be subject to certain disabilities, due to the fact that it comes more or less under State control. Excellent work has been done by the University Institutes, but their output is somewhat uneven in quality owing, no doubt, to the fact that their personnel is of a fluctuating character and to the occasional necessity of giving an innings to the weaker members of the team. The system of collaboration between individual researchers has certain advantages over the other forms of collective research. It appears on the whole to be more flexible ; the person whom we may describe as the principal investigator can choose his colleagues at large and select those best fitted to give him the assistance which he requires. He is also free from any restrictions which may, in certain circumstances, be imposed by governmental or academic policy. On the other hand, he is often handicapped by financial and other obstacles, which are less likely to arise if an Institute makes itself responsible for the carrying through of a piece of research work. Where it is a question of large-scale research, such as that embarked on by the League of Nations in the case of the Civil Status of Women, there can be little doubt but that the Institutes are best fitted to deal with the situation.

The problem of adequate teaching strength does not loom so large in the case of research as in other spheres of legal education. It is, however, desirable, if not essential, that the research student should be able to resort to someone of greater knowledge and experience than himself for advice in connexion with the choice of his subject, the method he is to pursue and the materials which are available. This is a matter which arises in connexion with research of all kinds, whether legal or otherwise it presents no special features in the case of comparative law, though it raises the question, incidentally, of the necessity for the inclusion in the teaching staff of Universities of the necessary personnel for the purpose.

The only conclusion at which it is possible to arrive at present is that comparative research has not yet entered on the final stage of its development. Individual research, team work by individuals and the organization of research by bodies especially created for the purpose—all these expedients are called on to play their part in the development of comparative legal studies. Much will, of course, depend upon the nature of the research which is being undertaken and on the capabilities of the researchers, but the situation is such as to call for the employment of every agency which may help to keep comparative research in being and to promote its development. The appreciation of the relative merits of the results achieved in each case must be left to the judgment of posterity.

A COMPARISON BETWEEN THE BRITISH AND THE NETHERLANDS MILITARY AND NAVAL LAW.*

[*Contributed by* LIEUTENANT DR. H. WINKEL.†]

THE need of the study of comparative law is not always readily recognized. Often comparative law is considered too abstract, too theoretical to be of practical importance. In this article it is not proposed to contest this opinion by a general review of the utility of comparative law for the understanding and development of every part of the law, but to give a specific example of the interest of comparison.

One of the consequences of the presence of Allied Forces in this country is the need to consider whether the constitution and formation of these Forces and the maintenance of their discipline ought to be regulated by the law of the United Kingdom or by the law of the relative allied country. By adopting the Allied Forces Act, 1940 (3 & 4 Geo. VI, c. 51) the British Government has chosen the latter of these alternatives. By doing so it acted in conformity with writers both on international law [1] and on military law.[2]

The Allied Forces Act, 1940, allows the maintenance of the international order and discipline of the Allied Forces by their own courts-martial and places at their disposal the British governmental machinery as far as it is necessary to give effect to this maintenance. At first sight the recognition of the autonomy of the Allied Forces would make a comparison between the British military and naval law and that of the Allies superfluous, as autonomy supposes that each has a sphere of action of its own. But this superfluity is only apparent ; for, apart from the infringement upon the autonomy by the necessity of technical and tactical collaboration—which, of course, is not discussed here—the autonomy of the Allied Forces is limited to " matters concerning discipline and internal administration "—(*vide* Allied Forces Act, s. 1 (1)). Their comparison is, therefore, justified. For how can the importance, which the British Government attaches to this limitation, be understood, unless one has obtained a general understanding of the system of the British naval and military law ? And, on the other hand, how can the application of the Allied Forces Act be appreciated unless the broad principles of the Allied naval and military law are explained ?

* The Article has been kindly revised in respect to the references to the British forces by the Judge-Advocate of the Fleet, J. G. Trapnell, Esq., K.C., and by Deputy Judge-Advocate Squadron-Leader O. Barnett.—Ed.

† The author is indebted to Major F. D. Maxwell-Fyfe, K.C., M.P., Paymaster-Lieutenant-Commander J. J. van Houten, R.N.N., and Captain of the General Staff H. J. Kruls, R.N.A., for their constructive criticism.

[1] See *e.g.* Hall : *International Law* (1917), p. 208, *et seq.*; Davis (G.B.) : *The Elements of International Law* (1908), p. 83 *et seq.*

[2] Clode (C.M.) : *The Administration of Justice under Military and Martial Law* (1872), p. 98.

Further, even if the autonomy of the Allied Governments were not limited, the fact that the help of the British authorities needs to be invoked for the application of the foreign military and naval law[1] makes it necessary that this law be discussed at some length.

Another reason for the comparison as proposed here is the circumstance that foreign military law has been long recognized as an authority in the British Army. Simmons[2] instances the Dutch "Laws and Ordinances touching Military Discipline" proclaimed in Arnhem on August 13, 1590, by the "Council of State," as having been printed in 1691 by Order in Council for the use of the British Army. So, too, from a historical point of view[3] it seems appropriate to choose the Netherlands military and naval law among the Allied laws to be compared with the British system.

Naval and Military Law Defined.—To begin with, it must be made clear what is to be understood by "naval and military law." In this country military law applies only to the Army, its most accepted definition being that "it is the law which governs officers and soldiers in peace and war, at home and abroad,"[4] although there is some evidence for a more comprehensive one, covering both the Army and the Navy. So, according to the *Manual of Naval Law*, the object of military law is "to institute a court invested with authority to try those who belong to *the army or navy*, as the case may be, for the offences designated, and within the precise limits specified by Act of Parliament."[5] In Holland the law administered both in the Navy and the Army[6] is termed military law because the rules governing both the Navy and the Army are substantially the same.

The main reason of the differentiation between naval and military law in this country is, I suggest, to be found in the difference in historical development: originally the articles of war of the Navy were enacted by Parliament, whereas those of the Army were framed from time to time at the pleasure of the Crown.[7]

There is another reason why military law has not the same meaning in both countries. In Holland enlistment, billeting and impressment of carriages are not contained in the same Act as the military penal law, as is the case with the British Army Act of 1881. In consequence of this these matters are in Holland, as a rule, not considered as within military law in

[1] Comp. the Statutory Rules and Orders, 1940, Nos. 1816, 1817 and 1818, *i.e.*, the Allied Forces (Relations with Civil Authorities) (No. 1) Order, 1940, the Allied Forces (Penal Arrangements) (No. 1) Order, 1940, and the Allied Forces (application of 34 Geo. V, c. 6) (No. 1) Order, 1940.

[2] Simmons (H. P. and T. F.): *The Constitution and Practice of Courts-Martial*, with a summary of the law of evidence (7th ed., 1875), p. 2.

[3] As books on Netherlands military and naval law were not available to the writer, no attempt has been made to compare its historical development with the British. Still, it is interesting to note that in both law there is a very strong historical continuity: *Manual of Military Law* (London, 1940), p. 6 *et seq.*: *Manual of Naval Law and Court Martial Procedure*, by J. E. R. Stephens, C. E. G. Gifford and F. Harrison Smith (1901), p. xi *et seq.*

[4] *Manual of Military Law*, p. 3.

[5] *Manual of Naval Law*, p. 27, Comp. as to the difference between naval and military courts: Delafons (J.), *Treatise on Naval Courts-Martial* (1805), p. 11 and p. 315 *et seq.*

[6] Both the British and the Netherlands system have in common that the law governing the Air Force is substantially the same as that of the Army.

[7] Comp. Blackstone (15th ed. 1809), Book I, p. 420.

the strict sense of the word, but as part of administrative law. So, too, the part of the Naval Discipline Act (ss. 91 *et seq.*) relating to enquiries into the wreck, loss, destruction or capture of a ship which are dealt with separately in the Netherlands Law [1] are not included in military law in the Dutch sense.

Jurisdiction of Courts-Martial.—It has been said hear that the autonomy of the Allied Forces is limited to matters concerning discipline and internal administration. Now this limitation must be brought into relation with the smaller scope of British military and naval law in comparison with the Netherlands military and naval law. Writers upon British naval and military law state repeatedly that a man who joins the navy or the army does not cease to be a citizen.[2] "Persons subject to naval, military or air force law are not exempt from the jurisdiction of the civil courts in respect of offences against the law of the land."[3]

The consequence of this is that a distinction is drawn between offences which are created only by the Naval Discipline Act or the Army Act and offences which are in addition also offences under the Criminal Law. The former can, of course, be tried only by courts-martial (or service disciplinary courts); the latter can be tried under the Naval Discipline Act or the Army Act only if they are committed in circumstances of place and time which bring them under the jurisdiction of these Acts; otherwise they are tried by the ordinary criminal courts.[4] Not so in Holland, where the courts-martial try all offences (except fiscal offences and those committed in collaboration with civilians) [5] committed by those subject to military or naval law, no matter if they are punishable by military, naval or civil law.

For this difference in scope of British and Netherlands naval and military law several reasons are to be given. One of them is, I suggest, the high esteem in which the civil courts always have been held in this country. Another one may be a distrust by Parliament [6] of the Army, exemplified by bringing into operation the Army Act and Air Force Act by an annual Act.

Yet there are good reasons for the exclusive jurisdiction of courts-martial over soldiers and sailors. An offence assumes another character by being committed by someone who "gives himself up wholly to his superior officer in religion, politics, civil relations, loyalty, internal and external behaviour." [7] A foreign student of British military and naval law may be astonished to find the limitation of the jurisdiction of courts-martial practically unchallenged. Neither writers on military law,[8] nor

[1] Naval Incidents Act of the 16th March, 1928 (Marine Scheepsongevallenwet, Staatsblad 1928, No. 69).

[2] *Manual of Military Law*, p. 1: Banning, *Military Law*, 20th ed. (1940), p. 141; *Manual of Naval Law*, p. 27; Simmons, p. 134.

[3] Halsbury, *Laws of England* (2nd ed. 1935), vol. 28, p. 1389.

[4] Army Act, s. 41; Naval Discipline Act s. 101.

[5] Art. 79 and 81 Invoeringswet Militair Straf- en Tuchtrecht (Introductory Act for military and disciplinary law).

[6] Comp. Clode, p. 2: "Raised as the Army originally was under an influence supposed to be antagonistic to freedom, the people have willingly remained ignorant of the peculiar laws and institutions under which both officers and soldiers were governed."

[7] *Warden* v. *Bailey*, 4 Taunt. p. 80, cited by Clode, p. 14.

[8] *Manual of Military Law*, p. 103.

even those on naval law (aware though these latter must be of the need of autonomy on board warships and a little less willing as they are to acknowledge the jurisdiction of the civil courts) [1] criticize the system.

Civilian Status.—The principle that a soldier or a sailor remains a citizen accounts for several other differences between British and Netherlands naval and military law, which have to be borne in mind when defining the autonomy of the Netherlands Armed Forces in this country.

Whereas for the British naval and military law it is sufficient—the Forces being exclusively recruited by voluntary enlistment in normal times—to limit its application, with a few exceptions [2] to those who are called to the colours without further qualification, the application of the Netherlands military and naval law needs to be determined in a more elaborate way, as the Forces are conscripted, and those who have been called to the colours actually serve only during the periods of drilling and, of course, in times of emergency. Consequently, in several cases they are subject to naval and military law even outside these periods of drilling, *e.g.* in case of disobedience to a calling-up notice.[3] And even after being discharged from service, they remain subject to naval or military law in case of insulting or assaulting their former superior officers, within a year after their discharge.[4]

Further, in consequence of the same principle, the civil courts may, though in practice they scarcely ever, interfere directly with trials before courts-martial by way of preventive (by issuing a prerogative writ) or of remedial (by allowing an action for damages) measures.[5] In Netherlands military and naval law the position is different. No direct interference is possible, although there remains a liability to an action for damages, in case of an unlawful act.[6]

In practice, however, this difference between British and Netherlands naval and military law is not serious because as a rule the civil courts cannot be concerned in the redress of grievances between persons both subject to military and naval law, if there is a prescribed method of obtaining redress for them.

Another result of the lasting civil status of British soldiers and sailors is that their obligations to come to the aid of the civil power are substantially the same as those of civilians. Martial law in the continental sense of "a special law defining the relations between the military and civil power in cases of riot and insurrection" [7] does not exist as a defined code in this country, which does not mean, however, that armed forces cannot be employed in aid of the civil power.[8] In Holland martial law is regulated by the statute on the "State of war" and "State of siege" (May 23, 1899) and a number of emergency statutes.

[1] *Manual of Naval Law*, p. 129/130. Delafons, p. 37.

[2] *Army Acts*, 175 *et seq.*; Banning, p. 11 *et seq.*; *Manual of Naval Law*, p. 117 *et seq.*; Delafons, p. 59 *et seq.*

[3] Arts. 60, 108, 110 and 150 Military Penal Code.

[4] Art. 64 Military Penal Code.

[5] *Manual of Military Law*, p. 135 *et seq.*; Banning, p. 323 *et seq.*; *Manual of Naval Law*, p. 240 *et seq.*; Delafons, p. 25 *et seq.*

[6] Art. 1401 Burgerlijk Wetboek (Civil Code).

[7] *Manual of Military Law*, p. 2. Comp. Delafons, p. 14.

[8] *Manual of Military Law*, p. 246 *et seq.*; Banning, p. 277 *et seq.*; *Manual of Naval Law*, p. 132 *et seq.*; p. 377.

Although the foregoing shows that according to British military and naval law on the whole the soldier and the sailor are put on the same line as the civilian, there are exceptions to this rule. In the case of civil rights and duties he is placed in a more favourable position ; he is exempt from certain duties and the recovery of his private debts is restricted.[1] The reason of these provisions is to be found in the interest of the Crown not to lose the services of its soldiers and sailors recruited by voluntary enlistment, whereas in Holland, with conscripted forces, there is no need for such provisions.

Jurisdiction of Netherlands Courts-Martial.—Finally, the question arises how far the different characteristics of British naval and military law (preponderance of citizenship ; almost exclusive application to sailors and soldiers on active service ; possible interference of the civil courts) affect the autonomy of the Netherland Forces in " matters concerning discipline and internal administration." Have the words " discipline and internal administration " to be interpreted according to the British or according to the Netherlands conception of naval and military law ? It is obvious that according to the former the autonomy of the Netherlands Forces is smaller than according to the latter.

The answer has not a merely theoretical significance, it is also eminently practical. Let me give one example : a person of military age who has been enlisted and has received a calling-up notice, or, as the case may be, who duly receives an enlistment notice,[2] and who disobeys it, commits—according to Netherlands military and naval law—an offence that falls under the competence of the court-martial and has become for the purpose of his trial a " member " of the force in which he is enlisted.[3] In British law this kind of membership is also known—according to section 4 (1) of the National Service (Armed Forces) Act, 1938, any person on whom has been served an enlistment notice shall be deemed as from the day specified in the notice to have been duly entered or enlisted for service in the force specified in the notice. Both systems consider such a person as a " member " of their Forces and try him by a court-martial.

Now the question is, whether the person committing an offence of the above-mentioned kind is a " member " in relation to whom the Netherlands court may exercise " in matters concerning discipline and internal administration, all such powers as are conferred upon it " [4] by the Netherlands military and naval law. If so, it is evident that a Dutchman in this country who has been enlisted and who receives a calling-up notice, or a Dutchman of military age who is called up and who refuses to obey the enlistment-notice, may be tried by a Netherlands court-martial in this country.

The question is really one of—as it is called in private international law—classification [5] ; is it the British or the Netherlands military and naval law that defines the terms " members " and " administration and

[1] *Manual of Military Law*, p. 241 *et seq.* ; Banning, p. 277 *et seq.*; par. 97–98 A, Naval Discipline Act.

[2] The question if the British courts should check the legality of the enlistment notice is not discussed here.

[3] Arts. 60 and 150 Military Penal Code.

[4] Sec. 1 (1) Allied Forces Act, 1940.

[5] Cheshire (G. C.), *Private International Law* (2nd ed. 1938), p. 24.

internal discipline " ? According to Dicey, " the incidents of a right of a type recognized by English law of any civilized country must be determined in accordance with the law under which the right is acquired."[1] What is true of private international law is also true of public international law ; there, too, the incidents of a certain term or institution, recognized by English law, must be determined in accordance with the law to which this term or institution belongs.

Consequently, my conclusion is that the implication of the Allied Forces Act is that the terms used in that statute to define the autonomy of the Allied courts-martial—recognized by the British Government, and so not conflicting with the public policy of the English law—must be determined by the law of the relative Allied Power. In other words, if, according to Netherlands military and naval law, a " member " is a person who has been enlisted or who receives an enlistment-notice, and if " discipline " includes the application of military and naval law to such a person, the Netherlands courts-martial established in this country are competent to deal with him.

Position of Ministerial Officers.—It is not only when seeking to determine the scope of Netherlands military and naval law in relation to the British naval and military law that differences between them are to be noticed. Differences in procedure and in substantive law should also be remarked.

Among differences in procedure the most prominent relates to the position of the ministerial officers. Attention may be drawn to the fact that there are indications that at least the two principal officers of the British courts, the judge-advocate and the prosecutor, have developed from one and the same official,[2] just as to-day the function of the prosecuting-officer (*Auditeur-Militair*) and the secretary of a Netherlands court-martial established in a besieged place or on board ship may be performed by the same official.[3]

It is this differentiation of the functions originally fulfilled by one official assisting the court—a phenomenon to be noticed in the history of almost every court in Western Europe—that accounts for the divergencies between the judge-advocate and prosecutor on the one hand, and the *Auditeur-Militair* and the secretary on the other hand. For, whereas the judge-advocate is to be identified with the secretary in so far as both keep record of the proceedings,[4] the judge-advocate resembles a secretary in so far as he advises the court in legal matters as an assessor of the court.[5] So also the prosecutor is to be identified with the *Auditeur-Militair* in so far as both explain the substance of the charge, but the prosecutor is more explicitly directed that he is " not a partisan but an officer of justice whose duty it is by laying all the relevant facts in evidence before the court to assist the court in ascertaining the truth."[6]

[1] Dicey's *Conflict of Laws* (5th ed., 1932), p. 43.

[2] Clode, p. 105.

[3] Art. 262 *Regtspleging Landmagt* (Code of Procedure for the Army) ; art. 140 *Regtspleging Zeemagt* (Code of Procedure for the Navy).

[4] *Manual of Military Law*, p. 55 ; Banning, p. 148 ; Delafons, p. 154 *et seq.* ; *King's Regulations and Admiralty Instructions* 439 *et seq.*

[5] Rules of Procedure (R.P.) 103 ; Banning, p. 148 ; Clode, p. 105 ; *Manual of Naval Law*, p. 104 ; opp. Simmons, p. 193.

[6] *Manual of Military Law*, p. 55 ; See also Banning, pp. 153–5 ; Halsbury vol. 28, p. 1150.

In another respect also, the position of the judge-advocate needs to be examined. As the representative of the Judge-Advocate General or Judge-Advocate of the Fleet [1] he is the link with the central judicial authority, for although in British naval and military law there is no judge-made law, still by the circumstance that the court-martial should be guided by his advice on any point of law and should not overrule it, except for weighty reasons [2] and, as regards the military judge-advocate, by his summing up at the conclusion of the case [3] he has a unifying influence. It may even be asked if, notwithstanding the opinion that the members of the courts-martial perform the functions of both jury and judge,[4] the distribution of the judicial task between the military judge-advocate and the court-martial is not very similar to that between judge and jury in the civil law courts, the constitution of the court being founded "on the great fundamental law of English liberty, the trial of a man by his peers."[5]

In any case, the decision is reached by methods which differ much from those used by a Netherlands court-martial. They are not bound to follow any opinion and precedents used to have a great importance.

Differences in Procedure.—There are other differences in procedure between the British and the Netherlands courts-martial. Whereas the members of British courts-martial are always officers, the presidents of Netherlands courts-martial of the army functioning in peace-time are lawyers.[6]

As to the proceedings before trial there is one striking difference in theory between the British and Netherlands naval and military law. According to the former, the taking of the evidence, the decision to bring the case before the court-martial and the drawing-up of the report leading to the trial, in naval law called "circumstantial letter," is almost wholly in the hands of the officers concerned (Commanding Officer, Convening Officer).[7] On the contrary, according to the latter, the *Auditeur-Militair* has a preponderant influence upon the decision of the C.O. to refer the case to the court-martial, and upon the preliminary investigations in the case which are held by a special officer, the so-called superintendent-officer.[8] In practice, however, in this country, the influence of the *Auditeur-Militair* is exercised by the Military, *i.e.* Prosecuting Department

[1] For the history of this office see: *Manual of Military Law*, p. 181; Halsbury, vol. 19, p. 1383.

[2] R.P. 103 (f) and Banning, p. 148–9.

[3] R.P. 42 and 103; Banning, p. 746. In naval courts-martial the defending officer sums up, Halsbury, vol. 28, p. 1152.

[4] *Manual of Military Law*, p. 69. It is generally recognized that originally the courts-martial were established with as much similarity with the civil courts as possible (Clode, p. 104; *Manual of Naval Law*, pp. 20–1; Delafons, p. 12). The possibility to refer to the confirming authority for an opinion upon the legal effect of the facts at which the court has arrived at a decision points also to its original character as a jury (R.P. 44 (c) and (g)).

[5] *Manual of Naval Law*, pp. 20–1.

[6] Art. 120, Code of Procedure for the Army; art. 197, Code of Procedure for the Navy.

[7] Banning, p. 118 *et seq.*; *Manual of Military Law*, p. 35 *et seq.*; Halsbury, vol. 28, p. 1149; *Manual of Naval Law*, p. 48, *et seq.*; King's Regulations and Admiralty Instructions 434 *et seq.*

[8] Art. 15, 30 *et seq.*, Code of Procedure for the Army.

of the Office of the Judge-Advocate General, which in every serious case advises as to the charges and evidence.

The trial itself, either by the British or the Netherlands courts-martial, is, of course, strongly influenced by the rules of procedure of the civil courts of its country,[1] so that to compare them in detail would imply a comparison of these rules of procedure in general, which is not the intention of this short essay. Nevertheless, various points are to be noted: (1) calling of witnesses as to character [2] is not possible according to the Netherlands military and naval law; (2) only in British naval and military law has the President—except in certain cases—a casting vote,[3] the Netherlands courts-martial having always an unequal number of members; (3) the difference between defending officer and friend of the accused [4] is unknown in Netherlands military and naval law—both systems, however, permit the defence to be made by counsel; [5] (4) according to both laws the deliberation on the finding is in closed court. [6] In the British military courts-martial, however, the result is not made known to the accused until confirmed by the Confirming Officer,[7] whereas in the British naval courts the members give their opinion on the conclusion of the hearing, though the decision is reviewed by the Judge-Advocate of the Fleet and altered by the Lords of the Admiralty if necessary; (5) the power of the confirming officer to confirm, revise or approve the findings of the court-martial are greater according to British naval and military law than according to Netherlands military and naval law,[8] where the "*fiat executio*" is now only necessary in the case of judgments delivered by Field Courts-Martial [9] and Naval Courts-Martial held outside the European or Indian territory of the Kingdom; [10] (6) the right of appeal, which according to Dutch military law is only excluded in case of Field Courts-Martial (Art. 257, Code of Procedure for the Army) exists in this country only by way of petition to the confirming or reviewing authorities, which include the Army Council and even the Sovereign, who act on the advice of the Judge-Advocate General of the Forces.[11]

Differences in Substantive Law.—Of the differences in the substantive part of the law the most important concerns the power of the C.O. to deal with offences summarily. In this country the power of the C.O. depends principally on the amount of punishment,[12] and does not affect the jurisdiction of the court-martial or the right of the soldier to be tried by the latter. In Holland, however, the C.O. can only deal

[1] Comp. Banning, p. 201.

[2] Banning, pp. 171, 215.

[3] Banning, p. 147 note.

[4] R.P., 87 *et seq.*

[5] Art. 116, Code of Procedure for the Army; art. 156 Code of Procedure for the Navy. Naval Discipline Acts, 63.

[6] R.P. (A) and art. 135, Code of Procedure for the Army; art. 143, Code of Procedure for the Navy.

[7] Clode, p. 138.

[8] A.A., s. 54. Only the finding of an acquittal does not need to be confirmed.

[9] Art. 256, Code of Procedure for the Army.

[10] Art. 197, Code of Procedure for the Navy.

[11] King's Regulations, 695. Comp.

[12] It is chiefly exercised concerning drunkenness and absence without leave: *Manual of Military Law*, p. 39; As to Naval Law see Naval Discipline Act, 56 (2).

summarily with those offences which are specifically mentioned in a special Act, the Discipline Act (" Wet op de Krijgstucht ").

According to this Act (Art. 2) a disciplinary offence, whether committed by an officer,[1] N.C.O. or ordinary soldier, is an act which, though not defined in any Penal Statute, is contrary to any military command or service regulation or inconsistent with military discipline[2] or order.

Although both the Naval Discipline Act and the Army Act contain a general provision which penalizes those who are guilty of any act, disorder or neglect to the " prejudice of good order and discipline,"[3] still in British naval and military law the subdivision—one of the main features of the Netherlands military and naval law—between military and naval law, properly so called, administered by court-martial, and disciplinary law, to be dealt with summarily is unknown. And the reason why this subdivision is non-existent in British naval and military law is explained by the circumstance that the power to deal with an offence summarily depends on the amount of punishment.

Besides these disciplinary offences, certain lesser offences, mentioned in the Military Penal Code, or offences committed under prevalently disciplinary circumstances, may be dealt with summarily according to Netherlands military and naval law.

As to the military and naval crimes, these appear in the Army Act under 14 headings (including offences in relation to billeting, impressment of carriages and enlistment), in the Naval Discipline Act under 8 headings, and in the Netherlands Military Penal Code under 7 headings. There is no need to compare in detail the differences in systematization.

Broadly speaking, the principal crimes, such as mutiny, insubordination, desertion, misconduct in the presence of the enemy are defined in similar terms. Two minor differences may be mentioned—(1) According to British naval (sec. 19 Naval Discipline Act) and military law (sec. 12 Army Act) the intention of not returning must always be proved in a charge of desertion, whereas according to Netherlands military and naval law (Art. 98, (2) Military Penal Code) absence without leave becomes desertion if it lasts in peace-time longer than 30 days, and in war-time longer than 4 days ; (2) According to Netherlands military and naval law, act of disobedience (Art. 114 Military Penal Code) may also consist of arbitrarily exceeding a lawful command, a possibility not provided for in British naval and military law.

Both in British and Netherlands military and naval law there is a great variety of punishments. In the Netherlands military and naval law there are different scales for the offences mentioned in the Military Penal Code and in the Discipline Act. In the latter a distinction is made between punishments for officers, N.C.O's and ordinary soldiers, and between punishments awarded in peace-time and in war-time.

[1] In Netherlands military and naval law the power to deal summarily with an officer is not restricted to offences committed in war-time, as it is in British naval law (Naval Discipline Act, s. 57 A).

[2] Military discipline is defined in the Disciplinary Rules (Art. 1) as " the maintenance of regularity and order in all, even in apparently trivial matters, relating to the military service ; the punctual obedience to all service regulations and the exact compliance with all military commands, even when they are only concerned with small matters."

[3] S. 40, Army Act ; s. 43, Naval Discipline Act.

In British naval and military law, distinction is only drawn between punishments for officers and all other ranks, whereas the Netherlands military and naval law provides, too, for special punishments for N.C.O.s.

In both British and Netherlands military law, the law usually provides a maximum punishment and allows that maximum or any less punishment in the scale to be awarded.[1] So also in both laws the circumstance of an offence being committed on active service [2] or in the face of the enemy is a ground for heavier penalty.

[1] S. 44, Army Act; s. 55, Naval Discipline Act.

[2] S. 189, Army Act.

TESTATOR'S FAMILY MAINTENANCE.

[*Contributed by* EDMOND H. BODKIN, ESQ., B.A.]

The degree of liberty of testamentary disposition differs widely in different countries. In some, such as the United States of America, and England prior to the Inheritance (Family Provision) Act, 1938, a testator has absolute power to disinherit those who have a natural claim on his bounty ; though in English law this power has only been acquired by slow stages. In others, such as Scotland, the movable estate is inalienable by will and must descend in fixed proportions to the testator's wife and children. An intermediate stage is represented by those countries in which, though the power of disposition by will is unfettered, the court is given power, on the application of the testator's dependants, should they be insufficiently provided for by his will, to vary his testamentary dispositions so far as may be necessary for their adequate support.

In the recent Inheritance (Family Provision) Act, England has, in common with the Dominions, adopted the latter principle. It is settled by the recent case of *Dillon* v. *Public Trustee of New Zealand* (1941, 2 All. E.R., 284) that the New Zealand Act does not impose a duty on the testator to frame his will in a particular way, but only gives the court jurisdiction to override its provisions ; and this seems clearly to be equally the case under the statutes of England and the other Dominions. The principle is not a new one ; in fact, the legislation represents a return to the *querella inofficiosi testamenti* of the Roman law. The first of the Dominion statutes was passed by New Zealand in 1900. This lead was followed by Victoria in 1906, New South Wales in 1908, Tasmania in 1912, Queensland in 1914, South Australia in 1918, and Western Australia in 1920. Similar legislation is also in force in Canada.

The legislation, which has thus been in force for a considerable period, appears to have worked well and to have been remedial in cases of real hardship. The English Act has, however, recently been subjected to criticism by Farwell, J., in the case of *In re Joslin, Joslin* v. *Murch* (1941 1, c. 200). " The jurisdiction under the Act," said his Lordship, " is one which is extremely difficult for the court to administer."

The Problem before the Courts.—No doubt many of the problems with which the judge may be faced in cases of this description are to a large extent insoluble ; but the hardship, though inevitable, may nevertheless be capable of some mitigation by a judicious distribution of what estate the testator is possessed of, and it is in just such circumstances that the assistance of the court may prove most beneficial. The greatest difficulties under the Act perhaps arise when the estate is insufficient to provide for the bare subsistence of all those who have a moral claim to the testator's bounty, and to a less degree when it is inadequate to enable them to live in the style appropriate to their station in life. When the estate is ample and the only question is how much is to be regarded as properly

given away to strangers, the problem should in some respects be easier ; though some judges appear to have considered the quantum of maintenance to give rise to even more difficult problems. When the estate is insufficient to provide maintenance for any of the dependants, it has been held that under the English Act no application can be made, as it was not intended to provide legacies. (See *Re Vrint, Vrint* v. *Swain,* 1940, 1, c. 921.) It is obviously undesirable in such circumstances that what little is available should be dissipated in costs ; and the minimum estimated value of the estate which justifies an application should perhaps receive the attention of the legislature.

The case of *In re Joslin* sup. is a good illustration of the problems which arise under the Act. The testator had in that case been married to the applicant in 1915. There was one child of the marriage, who died young, and the husband and wife lived together happily until 1934, when the husband deserted his wife for another woman. By the latter he had two children, both still infants. In 1937 a separation deed was executed whereby the husband agreed to pay the wife £1 per week during their joint lives. The husband died in 1939 leaving a will under which the whole of his property, which consisted of cottages worth about £370, was left to his mistress for life, and after her death to her children by him. The wife had a small income of £23 per annum from property of her own and earned £3 4s. od. per week by taking in boarders, whereas the mistress was absolutely penniless and dependent on assistance under the Poor Law.

Farwell, J., said that the testator was in a dilemma. He owed a duty to the wife who had lived with him for many years, had borne his child, and had apparently helped him from time to time with her money, and no doubt he had treated her badly when he left her and went to live with another woman. On the other hand, he was under a moral, if not a legal, obligation to provide for his children, who were none the less his because they were born out of wedlock, and for the woman who had borne them. The court had in cases under the Act to take into consideration moral as well as legal obligations. It was not an easy dilemma for a man to face. . . . However, if the estate was so small that it was not really practicable to provide for the wife and the other woman and her children, and there was some small provision for the former, it was open to the testator to say that in the circumstances there was a duty on him to make what little provision he could for the mistress and her children, although that meant that he must leave his lawful wife to continue to exist on what little she had.

His Lordship therefore dismissed the application with costs, since it was one which in all the circumstances should not have been brought.

The Guiding Principle.—The general principles upon which the discretion of the court is to be exercised under legislation of this nature were authoritatively laid down by the Privy Council in *Bosch* v. *Perpetual Trustee Co.* (1938 A. c. 463) ; and (subject to slight variations in accordance with the wording of the particular Act) these would apply to the legislation as a whole. The English Act, indeed, is clearly modelled upon the prior legislation of the Dominions and the body of case law arising thereon ; though it must be borne in mind in this connexion that its scope is somewhat narrower than the Act of New South Wales, which permits not only of maintenance being granted, but also of provision being made for education and advancement in life.

The Privy Council adopted the view of Salmond, J., in *In re Allen, decd., Allen* v. *Manchester* (1922, N.Z.L.R., at p. 220) that " the New South Wales Act was designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and the relative urgency of the various moral claims on his bounty." They also adopted that of Edwards, J., in *In re Allardice, Allardice* v. *Allardice* (29 N.Z.L.R., at p. 972) ; on appeal (1911 A.C. 730), that " the duty of the court is so far as possible to place itself in all respects in the position of the testator and to consider whether or not, having regard to all the existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving (*i.e.*, a fond and foolish) husband or father owes towards his wife or towards his children, as the case may be. If the court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the court to make such an order as appears to be sufficient, but no more than sufficient, to repair it."

The Privy Council further expressed their agreement with the opinion of Stout, C.J., in *In re Allardice* sup., that the New Zealand Act was something more than a statute to extend the provisions of the Destitute Persons Act, and also that the fact that the will is unjust from a moral point of view is not a sufficient ground for altering its dispositions, the first inquiry in each case being what is the need of maintenance and support, and the second what property has the testator left.

It was held in *Re Fuller* (1917 St. R., N.S.W. 348) (as indeed would seem to be clear on general principles) that the fact that the testator was misinformed as to the circumstances when he made his will, is of itself no ground for granting relief.

In *re Hawke* (1935, N.Z.L.R. Supp. 157) the court expressed the view that it was the duty of a father, if he had the means, to leave his dependants enough to enable them to continue the style of living to which he has accustomed them. This appears to be the highest at which his duty has been put ; the better view seems to be that stated in *Collins* v. *Public Trustee* (1927 N.Z.L.R. 746), that the provision must be adequate " according to the condition in life of the children, measured to some extent by the estate left by the parent, and guarding also the interests of those who have an equal claim upon the testator."

The wishes of the mother as to her child's education and upbringing, and the intention of the testator to increase the provision actually made by his will were also regarded as material in *Bosch* v. *The Perpetual Trustee Co.* sup. The task of exercising the discretion must always, as Lord Romer said in that case, be one of great difficulty and delicacy, and must always be one largely of guesswork, especially in the case of children of tender age of whose needs in the future nothing can be predicted with certainty.

The court has also to pay regard to those persons other than the dependants who have a moral claim on the testator's bounty. Though the class of dependants who may apply for maintenance is strictly limited to those specified in the various Acts, the court is in most cases given a wide discretion in safeguarding the rights of others to retain the benefits given them by the will. In several decisions in the

Dominions the rights of legitimate relations of the testator (other than the surviving spouse or children) have been safeguarded. Under s. 26 of the New Zealand Statutes Amendment Act, 1936, illegitimate children are permitted to apply for maintenance, provided the court is satisfied that the paternity or maternity of the testator has been admitted by, or established against, him or her during his or her lifetime.

In *Re Vrint* sup., Farwell, J., admitted the claim of the testator's mistress and his illegitimate children by her to keep what was given them by the will ; but illegitimate children could under the English Act only apply for maintenance (if at all) when legitimated under the Legitimacy Act, 1926. It must be remembered in this connexion that English law has always refused to inquire into the fact of paternity, though evidence of reputation of paternity is admissible, as in *Re Joslin* sup., hence the necessity of the proviso in the New Zealand Act.

Statutory Conditions.—The draftsman of the English Act has essayed the task of specifying in some detail the circumstances to which the court is to have regard in granting or refusing maintenance. These are the past, present, or future capital or income from any source of the dependant ; his conduct in relation to the testator and otherwise ; and any other matter or thing which in the circumstances of the case the court may consider relevant or material in relation to the dependant, the beneficiaries under the will, and otherwise. The court must also have regard to the testator's reasons, so far as ascertainable, for making the dispositions in the will, or for not making any provision, or any further provision, for the dependant. Any evidence of these reasons which is considered sufficient may be accepted, including any statement in writing signed by the testator and dated. But in estimating the weight (if any) to be given to such a statement, the court is to have regard to all the circumstances from which any inference can reasonably be drawn as to its accuracy.

It was held in *Re Vrint* sup. that a proof of the evidence to be given by the testator in proceedings against his wife for maintenance, taken by his solicitor and impliedly admitted by the testator, was admissible under this provision, though it might be that little or no weight should be given to it. " Evidence " is here not confined to evidence which is legal at Common Law or under the Evidence Act, 1938.

The English Act also limits the maintenance which may be given to the income of two-thirds, or, in certain cases, one-half, of the estate, though maintenance may be given out of capital if the net estate does not exceed £2,000. Subject to this limitation the order may, however, be varied on the ground of a substantial change in the circumstances of the dependant.

It was held in *In re Lidington, Lidington* v. *Thomas* (No. 2) (1940, 1, c. 927) that no order for maintenance out of capital could be made where it was impossible to ascertain the value of the net estate, *e.g.*, owing to a liability of uncertain amount under the covenants in a lease. But liberty to apply was there given in the event of the value being found to be less than £2,000.

The Directions of the Court.—The Act provides that the court is to have regard to the nature of the property, and not to order a provision for maintenance which would necessitate a realization which is improvident, having regard to the beneficial interests. In *In re Hills, Hills* v. *Foote* (1941 W.N. 123) the order expressly provided that the applicant should

not by virtue thereof have any power to require realization of any part of the estate, by the trustee of the will, nor should it affect the trustee's powers and duties to realize or postpone realization thereof.

The court is also expressly given power to give such consequential directions as it thinks fit for giving effect to the order, *e.g.*, for setting aside and appropriating such part of the estate as is sufficient to produce the allowance ordered.

The position in some of the Dominions is different. Thus it was held in *In re Gerloff* (1933 St. R., S. Aust. 351) that the court should exercise its jurisdiction to grant maintenance under the Act, and leave the executor to resort to another jurisdiction of the court for directions in case its order cannot immediately be carried out, owing to difficulty in realizing the assets. A "suspensory order," whereby a portion of the estate is retained to provide for further maintenance which may be ordered on a change of circumstances, though it seems to be permissible under some of the Dominion statutes, is clearly not allowed by the English Act.

The effect of an order is that for all purposes, including death duties, the will has effect as from the death as if it had been executed with the variations specified in the order.

The Children's Claim.—The class of persons who may apply for maintenance is, under the English Act, limited to the spouses ; a daughter who has not been married, or is by reason of some mental or physical disability incapable of maintaining herself ; and an infant son, or a son who is for like reasons incapable of maintaining himself. Children adopted by virtue of an order under the Adoption of Children Act, 1926, are included. It has been held in Canada that a child legally adopted in accordance with the law of the country where the adoption takes place can apply. (See *Re McAdam*, 1925, D.L.R. 138.) The widow may obtain an order for maintenance out of property bequeathed to her children. In *In re Lidington* sup., where the children were infants, a condition was imposed that she should undertake to maintain them, and it was said that the application should be renewed when they came of age. On the other hand, in *In re Hills* sup. no such condition was imposed, though some of the children were under age ; but the order was made conditional on the widow informing the trustees of the will of increase in her means, and there was evidence that the children were living with her and that she desired to provide a home for them.

When the testator has bequeathed not less than two thirds of the income of the net estate to a surviving spouse, no application for maintenance can be made by the children of that spouse. This provision should be carefully compared with what has in the Dominions been called the widow's paramount right. In *In re Crowe* (29 St. R., N.S.W. 547) this right was said to be only that as a general rule, and other things being equal, the widow's right was paramount, and that even if destitute and incapacitated from earning, she was in no better position than a son or daughter in like case ; and that if she were able-bodied she was not entitled to be maintained in idleness while helpless children were thrown on the State.

The Wife's Claim.—It has been considered in some cases in the Dominions that a provision accepted by a wife under a separation agreement is to be regarded as the measure of her rights under the statutes, unless it is shown that she preferred hardship to applying to the court

for judicial maintenance. (See *In re Gerloff* sup. ; *Re Phillips* 29, St. R., N.S.W. 191.) If, however, the wife has deserted the husband, she will not usually be entitled to any relief under the Acts. (See *Re Williams*, 1933, St. R., S. Aust., 107.) A second wife is entitled to apply, though if she has lived with the testator only a few years her claim will not be as great as that of a wife who has lived with him all through his married life and managed his household. (*In re Cunningham, Cuningham* v. *Cunningham*, 1936, N.Z.L.R., Supp. 69.)

The Husband's Claim.—The English courts have, perhaps, paid less regard to the claims of a husband than those of the Dominions. It was said in *In re Silvester, Silvester* v. *Public Trustee* (1940, W.N., 349) that applications by a husband should not readily be entertained in the ordinary way. In that case the husband, who was then 68 years of age, had, on his marriage at the age of 42, given up his business and undertaken the household duties and the nursing of his wife ; the latter, in return, paying the household expenses. His wife by her will left him £52 per annum on protective trusts. Since the husband, after living in comfort, found himself thus inadequately provided for and his chances of earning money had been very much prejudiced, if not extinguished, he was granted an extra £3 per week, which did not prejudice the other beneficiaries under the will except the Charities, which were residuary legatees.

In *In re Pointer, Pointer* v. *Edwards* (1941, 1. c. 60) where the husband was 83, and deaf, and had been deserted by his wife 46 years prior to her death, a small allowance was granted him out of his wife's estate.

In the same case an order was made in favour of a daughter who was married, but separated from her husband, and incapable of supporting herself. But if a married daughter is not under disability, she cannot in any circumstances be granted maintenance under the English Act. This is not the case in New Zealand, where, in *Allardice* v. *Allardice* sup., an order for maintenance out of her father's estate was made in favour of a daughter who was not under disability, but whose husband was a working man with a very small and precarious income. The testator had in that case been himself a working man but had made a considerable fortune.

Doubtful Points.—The English Act, notwithstanding its great attention to detail, has left open some doubtful points which have arisen in the Dominions. Thus it is not made clear whether the sufficiency or insufficiency of the provision made by the will for the dependants is to be determined at the date of the application or at some other point of time. Nor is it wholly free from doubt whether the Act applies to a partial intestacy, though there is strong ground for holding that it does. It is also to be observed that it contains no provision similar to that in the New Zealand statute regarding assignment of the maintenance ordered.

Domicil.—The English Act expressly requires that the testator should be domiciled in England ; and it would also seem to be essential that he should have died possessed of property in that country so that his will should be admissible to probate there. The applicant, however, would not require to be domiciled in England. (See *In re Found, Found* v. *Semmens*, 1924, St. R., S. Aust., 236 ; *In re Sellar*, 1925, St. R., N.S.W., 161.) It follows from general principles that the court, having jurisdic-

tion to grant maintenance in any country, can make an order affecting movable property wherever situate, though not, of course, immovable property outside that country. (See *In re Roper,* 1927, N.Z.L.R. 746 ; *In re Donelly,* 28 St. R., N.S.W. 34.)

Dispositions inter vivos.—The legislation of England and the Dominions is directed against disinheritance by will and does not affect dispositions inter vivos. It is accordingly open to a parent so to dispose of his property by gift or settlement in his lifetime as to defeat the right of his dependants to support out of his estate on his death. The English Act in particular excludes property over which the testator has a special testamentary power of appointment from the net estate on which the Act can operate, and it is possible that this provision may in some cases provide a loophole for evasion of the intention of the Act, though the danger does not appear to be serious.

An important decision in this connexion is *Dillon* v. *The Public Trustee of New Zealand* (1941, 2 All. E.R. 284). There the testator had entered into an agreement for valuable consideration to devise certain farms to his three children by his first wife. He made a will whereby he performed the covenant, and left the residue of his estate to his second wife, whom he had married subsequently to the agreement. The Privy Council, on appeal from the Court of Appeal of New Zealand, restored an order of Northcroft, J., allowing the second wife maintenance out of the specifically devised farms. They expressed the view that though the Act does not impose a duty on the testator to frame his will in a particular way, the court has jurisdiction to override its provisions in regard to the testator's estate at his death, though if the lands had been transferred in his lifetime the Act could not have operated on them. As Smith, J., in his dissenting judgment in the Court of Appeal had said, if this were not so, a young bachelor who had agreed for a consideration to leave all his property by will to a relative or friend or creditor might later marry and leave his widow and children without support in circumstances where the court could not modify the distribution of his estate, whereas the manifest object of the Act was to secure on grounds of public policy that he should not be permitted to leave them inadequately provided for. The fact that the testator was under obligations to third parties was, however, in the Privy Council's opinion, a relevant circumstance to be considered on the application.

Contracting Out.—The question whether the English Act impliedly prohibits contracting out, either in the sense of renunciation of prospective rights or waiver of rights already accrued, is one of great importance.

Abandonment of Rights.—Abandonment of the right to apply to the court subsequently to the testator's death is expressly permitted by the New South Wales Act ; and it was on this ground that in *In re Doogan* (23 St. R., N.S.W. 100) renunciation by settlement or agreement was held valid. The Canadian Act, on the other hand, has been held by its wording impliedly to forbid contracting out. (See *Re Lewis,* 1935, 2 D.L.R. 45.) In Victoria and New Zealand, whose statutes are silent on the point, renunciation of prospective rights has been held to be contrary to public policy (See *In re Pearson,* 1936, V.L.R. 355 ; *Re Dillon,* 1938, N.Z.L.R. 693) ; and it would appear that the same would be true of the English Act. Waiver of accrued rights seems to be equally opposed to public policy. *In Soho Square Syndicate Ltd.* v. *Pollard & Co., Ltd.* (1940, 1 c. 638) contracting out of the Courts (Emer-

gency Powers) Act, 1939, was held invalid, on the ground that if it were permitted the poor and ignorant might be induced to give up their rights without knowing what was involved ; and this reasoning would apply with equal force to the Inheritance (Family Provision) Act.

A curious question regarding abandonment of rights arose in *Mastaka* v. *Midland Bank Executor and Trustee Company, Ltd.* (1941, 1 c. 192). In that case the mother of the applicant was married to a Russian Jew a few weeks prior to the applicant's birth. They separated shortly after the marriage and the daughter was handed over to the care of a Mrs. Ward who had looked after her ever since. For about five years, but no longer, Mrs. Ward was paid 15*s*. per week towards the daughter's maintenance. The daughter suffered from a deformity, but this did not entirely disable her from earning a living. Her mother visited her occasionally, and at one time invited her to make her home with her mother and the man with whom she was then living, but this offer was declined. The mother, by her will, made no provision at all for her daughter. It was not known whether the husband was alive or what was his domicil at his wife's death. The application was refused, one sufficient ground being that it was essential to prove that the mother's domicil was English, and the evidence left this fact at large.

Farwell, J., said, however, that apart from that circumstance he should not feel inclined to make the order. It was a very unusual case, in that the testatrix as from the time when the daughter was five years old made no contribution towards her maintenance, and Mrs. Ward seemed to have required no such contribution from her. The daughter herself had apparently made no attempt to obtain assistance from her mother, and was content to allow things to proceed on the footing that the ordinary relationship of mother and daughter never really existed, and that there was nothing more than friendship between them. The mother might well have taken the view that in all the circumstances, whatever obligation she might have been under when the child was born, she was not bound to provide for her by will, having regard to the fact that she was content to live with Mrs. Ward and might be in a position to earn a living notwithstanding her physical disability.

The decisions of the courts, both in this country and in the Dominions, show that the consideration of the moral obligations attaching to the circumstances of the testator imposes a heavy burden on the judicature. The only alternative seems to be for the legislators to take responsibility for giving the right to the spouses and children to a definite proportion of the estate.

INTERNATIONAL UNIFICATION OF MARITIME LAW.

[*Contributed by* H. M. Cleminson, Esq.]

Maritime Mortgages and Liens.—"The maritime lien has been described as one of the most striking peculiarities of Admiralty law constituting a charge upon ships of a nature unknown alike to common law and equity. It arises by operation of law and exists as a claim upon the property, secret and invisible." In this way Dr. Griffith Price intriguingly commences his recent book on The Law of Maritime Liens, a book that should find a place on the shelves of all shipping lawyers and in all national or port town law libraries. Whether the Convention on Maritime Mortgages and Liens, signed at the Brussels Diplomatic Conference in 1926, which he prints in the Appendix, be generally ratified or not, the book will be useful to both practitioner and student, and provide good reading for anyone with a taste for reading law. In it the language of the sea mingles happily with that of the forum: "Salvage" (a noun, not a verb as unhappily popularized by Mr. H. G. Wells). "Bottomry" and "Respondentia" (now apparently instruments of the past), "Right in Rem," "Receiver of Wreck," and so on. Even the common words, "Collision," "Necessaries" and "Disbursements" have here a full salt flavour.

The author gives us a clear and interesting exposition of the law of England, and, aided by legal friends abroad, devotes chapters to comparative statements of the laws of other countries, notably Canada, the U.S.A., France, Germany and Italy.

In addition to the text of the Convention on Maritime Mortgages and Liens, as yet unratified by the United Kingdom, he gives some account of the steps taken in co-operation between lawyers, shipowners, underwriters, bankers and others and maritime governments to promote it, steps which commenced so long ago as 1904 round the table of the voluntary organization known as the Comité Maritime International, of which the late Sir Louis Franck of Antwerp was for many years the brilliant President.

The object of the Convention is to secure international recognition of Maritime Mortgages duly effected in accordance with the law of the flag, and to define the claims entitled to rank as liens on the ship, her freight and accessories and to settle their priority in relation to the mortgage and amongst themselves. Dr. Price's book shows how great is the confusion the Convention is designed to end.

The discussions that lead up to the Convention and the changes made in the course of the various draftings disclosed many divergent points of view, and on one important question there was a general swing over from one view to its opposite. In English law there is no direct lien for necessaries but the master has one for his disbursements and it takes priority over the mortgage: thus, indirectly, a supplier of necessaries on the faith of the master in practice obtains indirectly a preferred

maritime lien. There was no disagreement to the supplier being given a direct lien for necessaries supplied to enable the vessel to prosecute her voyage, but it was to rank after the mortgage. In the end it was agreed that the lien should take priority over the mortgage. Those who are accustomed to mortgages of land might well suppose that the security offered by the mortgage of a ship would be improved by a rule that no lien for necessaries can be created which will take priority over the mortgage. This, indeed, was the view at first submitted on behalf of the banks and generally accepted until a late stage in the discussions. It was agreed that maritime lien should attach in respect of claims resulting from contracts entered into and transactions carried out by the master away from the vessel's home port where necessary for the preservation of the vessel or the continuation of her voyage, whether the claims are of the master, ships' supplier, repairer, lender or other contractual creditor, but until a late stage in the discussions it was not agreed that the maritime lien should take priority over the mortgage unless it arose prior to the registration of the mortgage and was registered within a period of three months from the date the claim arose. On final consideration the banks, reversing their earlier submission, positively urged that priority for a lien for "Necessaries" over the mortgage is essential to preserve the "credit of the ship" in the interest of the mortgagee no less than that of owner and others concerned, and this view was adopted with general approval. Claims for "Necessaries" in practice mainly arise in respect of fuel and stores or the cost of repairs not resulting from collision or other accident of navigation. Usually the cost of fuel and stores will be covered by the freight, so leaving the capital value of the ship fully available to the mortgagee, and the repairs will have gone into the ship, thus maintaining its value as a security. Indeed, in most cases the repair bill will have been paid by the Underwriters. Any risk of prejudice to the lender from the liens for "salvage and contribution of the vessel in general average" and "collision or other accidents of navigation" and "for loss of or damage to cargo" it is the practice to cover by the terms of a deed of covenant which accompanies the mortgage and requires the owner to keep his vessel insured against such risks. The ship's cargo risks are generally insured through a Shipowners' Mutual Protection and Indemnity Insurance Association, commonly called "Club" and for war risks the vessel is insured through a mutual war risks club with Government reinsurance and marine risks to Hull and Machinery and, in time of war, third party claims by Lloyds Underwriters or Companies. The Collision and Salvage liens, especially the former, are in practice those most generally availed of, for a collision and (to a less extent, since Lloyds' form of salvage agreement is so frequently used) an act of salvage is commonly followed by the issue of a writ by the claimant and an undertaking for bail to avoid arrest, by the respondent. As Underwriters are generally responsible, the procedure involves no inconvenience to either mortgagee or cargo interest and greatly facilitates the adjustment of claims.

Limitation of Shipowners' Liability.—The Mortgages and Liens Convention is a sister-Convention to one on the Limitation of the Shipowners' Liability in the event of an overwhelming disaster, which like it remains unratified by the United Kingdom. The latter is designed to reconcile the conflicting laws of the United Kingdom and the Continental and

other Countries. United Kingdom law imposes an arbitrary limit regardless of whether the ship is lost or not lost ; continental laws are, or were, generally based on the value of the wreck plus any freight and " accessories."

Salvage and Collision.—These two unratified Conventions were part of a group of four that were in preparation together. The others were on " Collisions " and " Salvage " respectively. Those were adopted by the Diplomatic Conference in 1910 and have been ratified in the United Kingdom mainly by the Maritime Conventions Act, 1911. They have been ratified, too, by most other maritime countries.

The Salvage Convention binds a master, so far as he can without serious danger, to render assistance to everybody, even though an enemy, found at sea in danger of being lost, and, by the prospect of reward, encourages the salvage of property in danger. Every act of assistance or salvage which has had a useful result gives rise to a claim to equitable remuneration, but no remuneration is due if the services rendered have no beneficial result. In no case is the salvage reward to exceed the value of the property salved. This Convention thus substantially corresponded with previous British law.

The Collisions Convention, however, involved two substantial changes in English law. When two ships are in collision and both to blame, the Admiralty Court did not follow the Common Law Contributory Negligence rule of leaving the loss to lie where it had fallen, but it did not go so far as the Continental practice of apportioning the loss rateably according to the degree of responsibility. It followed the more arbitrary rule of apportioning it equally, regardless of the precise degree of responsibility. The Convention followed the Continental practice, which was accordingly adopted for the United Kingdom by the Conventions Act of 1911. Fears which were expressed in some quarters that the rule would be troublesome and unsatisfactory have proved groundless. It has presented no difficulty to either practitioners or the Admiralty Court and has operated to the general satisfaction of shipping, underwriting and commercial interests. The other substantial change in English law involved in the Convention was the abolition of the Defence of Compulsory Pilotage. This was effected by the Pilotage Act, 1913. Pilotage is largely compulsory in British Pilotage Districts and abroad. The change, therefore, greatly enlarged the liability of the ship. British shipowners accepted the greater responsibility, relying upon an assurance from the Board of Trade that they would be given the equality with the shipowners of other countries in the matter of Limitation of Shipowners' Liability promised by the Convention on that subject which the Brussels Diplomatic Conference had in hand, but to some details of which the Governments wished to give further consideration.

The British Government has, however, given promise of ratification and repeated assurances that nothing but the time of Parliament and Parliamentary draftsmen stood in the way of the necessary legislation.

The Conventions mentioned are only four of several Conventions or Agreements effected in recent years as a result of the concerted efforts to secure greater uniformity of maritime law and practice and higher and internationally uniform standards of Safety of Life at Sea.

Bills of Lading Convention : Hague Rules for Carriage of Goods by Sea.—An important advance was made when, in 1921, a comprehensive set of Rules was agreed internationally at the Hague for general adoption

throughout the world defining the responsibilities and liabilities, rights and immunities of a carrier of goods by sea. The Rules were embodied in a Convention at the Diplomatic Conference in 1923 and made compulsory for the United Kingdom in 1924. They have been adopted so generally throughout the world that the great bulk of world trade is now carried under the Rules, giving corresponding certainty to buyers and sellers, shipowners, bankers and underwriters.

This Convention, of course, left the Limitation Convention to define the overriding limit of liability in the event of an overwhelming disaster, which is essential for maritime ventures.

Though critics prophesied that the Rules would give rise to much litigation, the exact opposite has resulted.

Safety of Life at Sea.—In 1929 a Convention was agreed in London on Safety of Life at Sea for merchant ships. It prescribed internationally agreed standards in regard to Subdivision (watertight bulkheads), wireless, boats and other life-saving appliances, periodical surveys and other subjects.

Load Line.—In the following year another Safety Convention was agreed, known as the Load Line Convention, 1930, by which an International Load Line for merchant ships—passenger or cargo carrying—was agreed, with Rules defining its position and marking, special rules being laid down for oil tankers and timber carriers, and prescribing conditions under which deck cargoes of wood goods may be carried in winter and summer respectively. It also provides for annual inspections. Legislative effect was given to these two Conventions in the United Kingdom in 1932.

Immunity of State Owned Ships.—A Convention on Immunity of State Owned Ships, prepared by the Comité Maritime and adopted by the Brussels Diplomatic Conference, 1926, is designed to correct the injustice that arose in and after the last war from the increase in public ownership and control of merchant ships combined with the immunity which the courts of most countries conceded to State-owned maritime property even when engaged in commercial operations, and the partial immunity of privately-owned ships in the possession or service of a sovereign State. In effect, the Convention provides that State-owned or operated vessels and cargoes and the cargo and passengers carried on such vessels and the States owning or operating such vessels shall be subject, in respect of claims relating to the operation of such vessels or to such cargoes, to the same rules and liabilities and the same obligations as those applicable to private vessels, persons or cargoes. Further, such rules, obligations and liabilities are to be enforceable by the tribunals having jurisdiction over privately-owned vessels or cargoes or their owners and by the same procedure. This is subject to the exception that in the case of ships of war and other State-owned or operated vessels employed only in governmental non-commercial work and State-owned cargo carried only for the purpose of governmental non-commercial work on State-owned or operated vessels, such liabilities are to be enforceable only by action before the tribunals of the State owning or operating the vessel in respect of which the claim arose.

The Convention is supplemented by a Protocol dealing with chartered ships in wartime.

The Convention has not yet been ratified in the United Kingdom,

but Section 13 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, enables effect to be given to it.

Penal Jurisdiction in matters of Collision.—The question of penal jurisdiction in matters of collision at sea was brought into prominence by the fact that an officer of a French vessel was prosecuted in Turkey for causing the death of Turkish nationals in a collision with a Turkish vessel outside Turkish territorial waters. The Permanent Court of International Justice held that no principle of international law would prevent such prosecution before a Turkish Court, although the act occurred outside Turkish territorial waters. The Comité Maritime International, at their Paris Conference, May 1937, adopted a draft Convention providing that in the event of a collision or other accident of navigation on the high seas, the master or other person in the service of the ship can only be prosecuted under penal or disciplinary proceedings before the Courts of the State of the vessel's flag, and that no arrest or detention of the vessel shall be ordered by any other Authorities than those of the vessel's flag. As regards collisions or other accidents occurring in the territorial waters of a State other than that of the vessel's flag, the High Contracting Parties mutually agree, without abandoning their sovereign rights to institute penal proceedings in respect of infringements committed within their own territorial waters, to follow in practice the above principle. The draft Convention corresponds with the more general practice of Maritime Countries and the growing recognition that maritime safety is best promoted by steps more apt than the Criminal Courts can provide, namely, the proper training and certification of officers and men, maritime enquiries into causes of casualties and suspension or cancellation of certificates in a proper case, and so on.

Civil Jurisdiction in matters of Collision.—In order to minimise the conflicts of jurisdiction in different countries, the Paris Conference, May 1937, adopted a draft Convention on Civil Jurisdiction in matters of Collision. It provides that actions for collision can be instituted at the Plaintiff's option only :—

(*a*) before the Court of the domicile of the Defendant or the port of registry of the defendant ship ; or

(*b*) before the Court of the place where the defendant ship has been arrested, even when the ship has been released against a guarantee before the action has been instituted ; or

(*c*) before the Court of the place of collision when the latter occurred within territorial waters.

These provisions are, however, without prejudice to the right of the parties to have the matter brought before a Court chosen by mutual agreement or to refer it to arbitration.

Provisional Arrest of Ships in matters of Collision.—This Convention, also adopted by the Paris Conference, May 1937, supplements the Conventions on Civil Jurisdiction in matters of Collision and the Code already in force on Collisions at Sea. It provides that any creditor of the owner of a ship, by reason of a collision, may make a provisional arrest of the ship. Arrest can, however, only be effected under the authority of the Court and subject to suitable guarantees by the arresting creditor, and provision for release of the arrest when adequate guarantee is supplied.

Other Conventions.—Other Maritime Conventions have been adopted

in recent years under aegis of the League of Nations. The Maritime Ports Convention, 1923, establishing the principle of freedom and equality for all ships engaged in International trade in all ports. The Sanitary Convention, 1926, designed to prevent the spread of plague and other infection by fumigation with a maximum effectiveness and minimum of duplication, provides for the international acceptance of fumigation certificates. The International Labour Office's Seamen's Conventions of 1920 provide for—

(1) an Unemployment Indemnity for seamen in case of loss or foundering of their ship ;
(2) a minimum age for the admission of young persons to employment as trimmers and stokers ; and
(3) compulsory medical examination of children and young persons employed at sea.

All these Conventions have been largely ratified by Maritime Countries.

Progress has also been made on the subject of the Measurement of Ship for the purpose of liability to Canal and Port dues, a subject already largely covered by bi-lateral agreements.

In addition to the progress made in the drafting and adoption of Conventions there has been further progress in the Standardisation of Charter Parties, and in 1924 the York-Antwerp Rules of 1890, a voluntary code, under which the burden of a General Average sacrifice made to save ship and cargo is apportioned among owners of ship and cargo, were revised at the International Law Association meeting at Stockholm. Further, Shipowners have in recent years for the first time come together through the International Shipping Conference in agreement as to certain major tramp freight rates, while the value of rationalisation of Liner services and freight and passenger rates through Line Conferences—indeed, its necessity—has been more fully recognized.

Future Progress.—It will thus be seen that in one way or another much of the field of maritime law and practice has been covered. But the delay in ratification of the Conventions on Limitation of Shipowners' Liability and Maritime Mortgages and Liens, and the time and labour spent in efforts towards unification of law have been such that there is a strong feeling among those who have spent a lifetime at the work that unless the Legislatures are prepared to adopt the actual Conventions as they stand as a piece of International Law made binding upon the National Courts, with such explanatory and supplementary provisions as may be thought necessary, there can be little prospect of any great progress in future. This was in effect done in the case of the Bills of Lading Convention, which embodies the Hague Rules for the Carriage of Goods by Sea, with the result that ratification followed in most countries almost immediately upon signature, and its ratification has perhaps been more general throughout the world than that of any other Maritime Convention. But the Executive in England and in many other countries has hitherto insisted that the national law should be re-written as if the changes were purely national. The unfortunate effect of this practice is greatly to increase the labour involved, minimise the speed of ratification and even prejudice ratification itself. Instead of having one code for all countries ratifying, there are almost as many codes as countries, so that the business man is deprived of the advantage of simplicity and certainty and the tendency of Courts to come to conflicting conclusions is increased.

THE CONFLICT OF LAWS IN ZANZIBAR.

[*Contributed by* The Rt. Hon. Sir Sidney Abrahams, *formerly Chief Justice of Zanzibar.*]

Zanzibar presents a number of extremely interesting legal features. It is a Protectorate, or, as it might be styled, a Protected State, since the Sultan still maintains administrative sovereignty. Thus there exists a duality of legislative authority and a dual jurisdiction. The King has authority to legislate for British subjects by Orders in Council which, together with any Acts of Parliament applying to Zanzibar, are declared by the Imperial Enactments (Application) Decree, 1939, to be applicable to subjects of the Sultan. The Sultan himself retains legislative power over his own subjects which is exercised by Decree passed by the Legislative Council. Justice is administered by the Courts of His Britannic Majesty (ordinarily known as the British Courts) wherever either of the parties to the case is a British subject and by the Courts of the Sultan where both parties are subjects of the Sultan.

In 1923 a long and badly-needed process of assimilation took place where the British Courts and the Sultan's Courts were given the same designations, the same juridical hierarchy and a similar quantum of jurisdiction, while, to complete the parallel, appeals from the High Court of the Sultan were allowed, like appeals from His Britannic Majesty's High Court, to be taken to the Court of Appeal for Eastern Africa and thence to the Privy Council.

The law administered under this dual jurisdiction has been made the subject of a short book, called " The Conflict of Laws in Zanzibar," by Mr. H. E. Kingdon, Resident Magistrate in Zanzibar since 1936. During this period Mr. Kingdon has acted as Judge of the High Court and he is also the present Editor of the Zanzibar Law Reports.

This work, which occupies no more than 46 pages, gives nevertheless a concise account of the law applicable in both sets of Courts and the manner in which the existing position has been gradually reached. Put briefly, the same system of criminal and civil procedure and practice and the same rules of evidence (the Mohammedan law of evidence is specifically excluded from all Courts by the Evidence Decree adapted from the Indian Evidence Act) obtain in all Courts, as do the Decrees of the Legislative Council assented to by the Sultan and, to make them applicable to the British Courts, countersigned by the British Resident. As noted above, Imperial Orders in Council and Acts of Parliament applicable to Zanzibar now form part of the law administered in all Courts. There is, however, a wide divergence in the matter of the remainder of the substantive law applicable. Apart from Zanzibar Decrees and Imperial legislation the *corpus juris* in the British Courts consists of the Common Law and doctrines of equity (Zanzibar Order in Council, 1924, Article 24) whereas in the Sultan's Courts the remainder of the *corpus juris* consists of the Sheria (Law of Islam) as understood in Zanzibar.

Considerable space is given by Mr. Kingdon to the case of *Rana Ramji* v. *Radhabai,* 5 Z.L.R. 91, in which Law, C. J., held that in matrimonial matters Hindus in Zanzibar are governed by their personal law. This right was secured by Clause 26, Bombay Regulation 4 of 1827 which applied to the then Consular Court of Zanzibar when the Zanzibar

Order in Council, 1884, declared that for judicial purposes Zanzibar was to be regarded as if it were a district in the Presidency of Bombay, Acts of Parliament and Regulations of Government applicable to the case, and in the absence thereof, the usage of the country in which the suit arose, and in the absence thereof the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience. The learned Chief Justice held that had the suit been brought whilst the 1884 Order in Council was operative Clause 26 Bombay Regulation 4 of 1827 would undoubtedly have applied to the parties. He was of the opinion that the succession of superseding Orders in Council of 1897, 1906, 1914 and 1924 kept Clause 26 in operation, though the Order of 1914 terminated the association of Zanzibar with Bombay, and that in the absence of local legislation affecting the matrimonial condition of Hindus the Bombay Regulation made the personal law of the parties govern the case. It is interesting to note that in his book, " The Dual Jurisdiction in Zanzibar," published in 1935 (two years before the above decision), Mr. J. H. Vaughan, then Assistant Attorney-General, Zanzibar, observed, " the famous Regulation of 1827 which prior to 1914 constituted the authority for the application of such laws in the Protectorate can no longer be regarded as the authority for the application in Zanzibar of the rules of Mohammedan law or other systems of personal laws."

Article 24 of the Zanzibar Order in Council (the prevailing instrument regulating the jurisdiction of the British Courts) declares that the statutes of general application in force in England on July 7, 1897, shall be applicable where Imperial Orders in Council and local Decrees do not extend or apply. Mr. Kingdon cites a number of cases where certain statutes were held to be of general application—that unsatisfactory expression which he says that, so far as he is aware, has never been exhaustively defined. The Bills of Exchange Act, 1882, the Fatal Accidents Act, 1846, and the Trustee Acts in force on July 7, 1897, have been held applicable in Zanzibar as being of general application. There are divergent decisions as regards the Bills of Sale Acts, 1878 and 1882, and the author inclines to the view that they are inapplicable. The Slander of Women Act, 1891, has been held applicable in the neighbouring territory of Tanganyika, and it is thought by Mr. Kingdon that the Zanzibar Courts would probably accept the decision as a persuasive precedent. On the other hand, he is of the opinion that the Statute of Frauds would probably be held inapplicable in Zanzibar.

In view of the fact that, apart from Imperial enactments and local decrees, the substantive law of Zanzibar administered in the Sultan's Court is the Sheria, it is, of course, necessary to consider in a work on the Courts in Zanzibar what branch of the law of Islam is in fact applicable and in what circumstances. There are actually two schools of law only, out of the many in Islam, which are recognized in the Sultan's Courts, namely, the Ibadhi and the Shafei. It is the former to which the Zanzibar Royal House, like that of the ancestral State of Muscat belongs, though it appears that the large majority of the Sultan's subjects are Shafeis. All Kadhis in Zanzibar are Ibadhi or Shafei, and it is the ordinary Mohammedan law that a plaintiff may select which Kadhi he pleases, though the Kadhi must apply the law of his own school irrespective of the sect or sects to which the parties themselves may belong. In the Zanzibar Courts the law of Islam may be varied and (for instance, in respect to evidence) superseded by enactment, and

the Kadhi must, of course, decide accordingly. Where the presiding officer in the Sultan's Court is a Judge or a Resident Magistrate, as a Zimmi or non-Moslem, he cannot be said to belong to either prevailing school and the rule is that he must apply the law of the parties. In the event of any difference in this matter the best view seems to be that he should select which seems to him to be the fairer in the particular case (Vaughan, " The Dual Jurisdiction in Zanzibar," page 43).

Mr. Kingdon ends by some observations on the Yamin-El-Mugellaz—the " Precautionary Oath." An emphatic difference between English and Islamic jurisprudence resides in the employment of the oath. In the former it is a condition precedent to testification and an undertaking to tell the truth, in the latter it is ordered by the Court to be taken by that one of the parties upon whom according to the Islamic law the burden of satisfying the Court on the justice of his case rests at that particular stage. Since, however, by Section 1 of the Evidence Decree the evidence embodied in that enactment, which, being an adaptation of the Indian Evidence Act, may be broadly said to be English evidence, applies to all Courts in Zanzibar, and by Section 2 the Mohammedan law of evidence is declared inapplicable in any Court, it follows that any question as to the burden of proof in the Sultan's Courts would ordinarily be decided by the same rules as those prevailing in the British Courts, and by the Oaths Decree all witnesses must take an oath or make an affirmation.

In one respect, however, the law of evidence, as laid down by the Evidence Decree, is modified by the Oaths Decree in such a manner as to effect a measure of reconciliation between the English and the Islamic Law of Evidence. By that enactment if any party to a case offers to be bound by oath or affirmation taken by the other party in any form common amongst or held binding by persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, the Court may ask the other party whether he will make the oath or affirmation. If he agrees to do so the oath is administered and the evidence so given is regarded as conclusive proof of the matter stated. If he refuses to do so the Court shall record as part of the proceedings the nature of the oath or affirmation, the facts that he was asked to make it and that he refused, together with any reason assigned for refusal. A refusal to make an oath when challenged to do so does not authorize the Court *ipso facto* to give judgment against the party so challenged. In *Aley* v. *Mohamed,* 4 Z.L.R. 63, it was held that it is contrary to law to base a judgment on a defendant's oath regarding the justice of the claim as distinguished from the evidence adduced, and in *Ismailji Mohamedali* v. *Hasan,* 5 Z.L.R. 87, where one ground of appeal was that the Magistrate had taken into consideration the fact that the appellant refused to allow the case to be determined by oath in the Mosque, the Chief Justice said: " I regard this aspect of the case as an expression of the Magistrate's opinion of appellant's demeanour more than anything else which the Magistrate was entitled to do." Mr. Kingdon thus comments on this aspect of Zanzibar law: " The synthesis thus happily effected between the thesis of the traditional Islamic procedure and the antithesis of the Evidence Decree, which affords a striking example of the Hegelian dialectic, is of no little consequence in a country where the peculiar jurisdiction of the Kadhis plays an important part in the administration of justice."

WAR TAXES.

[*Contributed by* F. Bower, Esq.]

Whatever else may be in doubt in war, one thing is certain, namely, that someone must pay for it. To this end there is much hard thinking to be done and all ideas, old and new, will need to be brought under review. Lessons must be learned from the experience of other communities as well as our own ; the probable position of the national finances must be estimated ; the probable reactions of one type of tax compared with another must be shrewdly judged ; and the general monetary policy must be carefully planned, with taxation as an important, but by no means the most important, instrument for giving effect to it.

This is a subject which shapes the ordinary life of every person, although to the great majority it appears to be one of those things which must be endured but cannot be controlled. The material standards of life of everyone will be lower as the inevitable result of the destruction and unproductive effort of war. The load to be carried will be very heavy. The trimming of the load is a matter of serious importance. If it is wisely spread it is most tolerable and it will least impede the progress of the community in repairing the damage. If it is recklessly imposed it will hinder and temporarily stop recovery by reason of the disturbances and wasted effort which result from maladjustments. With so much to be done the country cannot afford the repetition of over a million idle pairs of hands, nor can it afford to repress brains and initiative by confiscatory taxation.

Professor Hicks and his collaborators have made a valuable study[1] of the problem as the result of a grant by the National Institute for Economic and Social Research for a comparative study of Excess Profits Taxes and Capital Levies. It is safe to predict that the report they have compiled will be referred to frequently and seriously in the planning of reconstruction for after the war. More than that, it would be good if every citizen could read the first twenty-eight pages on the economic background of war-time taxation and learn the significance of war debts, inflation and taxation, in order to give him a surer mental touchstone by which to test what he reads in the newspapers and hears from political speeches.

The volume has its defects and it does not in the least detract from its merit to mention them. Indeed the author, in his Foreword, warns readers that it was deemed advisable not to delay publication by striving after polished form.

It is a report rather than a book, and though adhering to the terms of reference which referred only to one aspect of a big subject, the larger problem appears as a setting for the study of Excess Profits Taxes and Capital Levies rather than as the central theme. The review of past taxes in other countries is marvellously condensed to bring out the salient lessons to be learned, but it is too sketchy to be living. The admiration which is expressed for the British tax administration compared with that of other countries is misplaced. Our Revenue officials are neither better nor worse than their opposite numbers in other countries. Their

[1] *The Taxation of War Wealth*—J. R. Hicks, U. R. Hicks, L. Rostas. Published by Clarendon Press, Oxford.

greater success is due to the British taxpayer. The review of present taxes suffers the fate of all tax publications—it is out of date before the ink is dry. The title is not particularly happy ; the subject is War Taxes rather than Taxation of War Wealth—a very different thing.

One of the most valuable aids to accuracy is the classification of taxes by reference to their real nature whatever their official names may be. A tax upon the rise of profits above the earnings of a prior period is called an excess profits tax and carefully distinguished from a tax on profits above an arbitrary level, usually a percentage on capital regardless of normal earning capacity. The latter is called a High Profits Tax. An Excess Income Tax is different from an Excess Profits Tax in that it taxes increases in all income, including employments, professions, and investments. A capital tax is not a capital tax if it is merely calculated by reference to capital, but is so modest that it can conveniently be paid out of income. An income tax may be a capital tax if it is so heavy as to eat into capital.

The labels are open to criticism. The term Excess Profits Tax is more apt to describe that which is called a High Profits Tax. That which is called Excess Profits Tax should be further divided into (*a*) a tax on War Profits—of which the old Excess Profits Duty is an example ; and (*b*) a tax on all Increase of Profits—of which the new Excess Profits Tax is a type. The term High Profits Tax is more suited to a tax on total profits at a high rate. The distinction between a capital tax and an income tax by reference to whether it is paid out of capital or income is weak, because the incidence of the impost may be governed by the private expenditure of the taxpayer.

It is unfair to try to convey in tabloid form the conclusions of a report which contributes much original thought on many aspects of the subject, but a glimpse may tempt a detailed scrutiny. War wealth is the inevitable consequence of the transition from peace to war organization where full control of all society is not possible, and it is not wholly evil because the incentive of private gain brings out further war effort which cannot be excited by patriotism or compulsion. But the idea of earning a profit out of war is socially repugnant. It satisfies the political need and checks consumption and therefore inflation for the State to appropriate as much as possible of this war wealth by taxation. To tax it all away is harmful because it kills the extra war effort produced by hope of reward. To tax war wealth is much more delicate than peace-time taxation and brings its own particular problems. One of these is the fact that war profits are often not represented by money but by expanded assets, and the cash to pay the tax is not available. In fact, it is the experience of this and other countries that the peak yield of war taxes comes after the war is ended and they operate to check the inflationary re-stocking boom. Taxation is only one instrument of general monetary policy and should be attuned to it. War taxation has often proved a failure because inflation has reduced the real burden of the tax. On the other hand, deflation can induce a depression which necessitates the cancellation of arrears and the repayment of part of the paid taxes to save the business world from bankruptcy. On the strength of his conclusions the author hazards a guess of the future of the present Excess Profits Tax. He expects the 100 per cent. rate to be dropped to a lower rate or the tax repealed as soon as war is over so as to avoid wasteful expenditure at the expense of the Treasury. He advocates the imposition

of a tax on increases in salaries and professional earnings. This was prior to the 1941 Budget, which provided for a post-war rebate of 20 per cent. and a standard rate of income tax of 10*s.* and surtax running up to 9*s.* 6*d.*

The merits and demerits of a levy on capital with the object of lifting part of the dead load of debt are carefully examined for its expected economic consequences and in the light of similar experiments in Europe. He concludes that a levy is workable provided it is carefully prepared for by valuation, and the levy follows quickly on the valuation and is timed to coincide with the beginning of a boom, and payment is not deferred. The expected yield, however, is no more than a sum sufficient to reduce the income tax by 6*d.* in the £1, and it is not to be recommended on economic grounds unless the majority of taxpayers want it and the above requisites were assured.

The report is stimulating. The facts and arguments are stated with the directness—almost downrightness—that one would associate with a Northern University. It is not to be expected that they will find instant and unanimous agreement, but no one can read the volume without being constrained to sit back and think as he reads.

THE ARGENTINE CIVIL CODE.

[*Contributed by* V. R. Idelson, Esq.]

The Faculty of Law and Social Science of the University of La Plata has published three volumes of studies dealing with the history and the reform of the Argentine Civil Code.[1] Unfortunately, one volume appears to have been lost in transit, but the first and the third which reached us happily contain what seems to the reviewer the most important contributions on the subject—the basic principles of the new draft Civil Code. The missing volume deals with the law of family relations, successions and servitudes.

It is impossible to give in this note even the shortest account of the full and learned dissertations touching upon all the important questions of the Argentine Civil Law. The reviewer has, therefore, confined his observations to a few remarks on the history of codification and to what he regards as the basic problem of any codification—the question of the completeness of the legal system in question. The history of codification of civil law in the Argentine is given by Signor Lanfranco (T. IX). While the Argentine was a Spanish colony its law was contained in special legislative enactments for Spanish colonies and—as a subsidiary source of law—in the codes of the mother country. As the colonial legislation had few provisions of civil law that law was mainly sought in and its evolution shaped by the Spanish Codes. Great confusion reigned during the period between the revolution of 1810 and the coming into force of the Civil Code (January 1, 1871). The author of that Code, Velez Sarsfield, pointed out that the chaotic state of legislation in the Argentine was even worse than in England (p. 13) and that owing to the impossibility to ascertain the law the discretion of the judge had become the law (el arbitrio del juez es en definitiva la ley suprema, p. 14). The introduction of the Civil Code considerably cleared the existing confusion

[1] Anales de la Facultad de Ciencias Juridicas y Sociales de la Universidad de La Plata, dirigidos por Enrique V. Galli. Tomo IX, X, XI. La Plata, 1939–1940.

but many special laws had to be published between 1886 and 1938 to supplement the provisions of the Code (pp. 77–80). Many other reforms were contemplated and the enactment of a new civil code was continuously urged since 1916. It was felt that the " stupendous intellectual feat " (estupendosa hazana intelectual, *Chaneton* on p. 50) of Velez was not meeting the needs of rapidly changing social conditions in the Argentine, was ceasing to be a sure guide for the judges and was becoming incompatible with new legal principles (p. 129—Professor Lopez *La Teoria General de las Layes*).

The Draft of the new Civil Code is not based on entirely new principles. It is not—as Professor Lopez points out (p. 137)—new in the sense in which the Civil Code of R.S.F.S.R. or the Fascist legislation of Italy and Germany are. The draft records and takes into account several changes of the last 70 years, but is also aiming at improvement of the form of the codification (tecnica formal, p. 123).

Professor Arias thinks that the language in which the new Draft is couched is not happy (lo menos feliz del proyecto es lo relativo a su lenguaje, T. XI, 538). Professor Sanchez's view is that there is in the draft technical progress (progreso tecnico, p. 668). He points out that the draft is much influenced by the German (pre-Nazi) Civil Law and jurisprudence. He regrets that the reform of the existing Argentine Civil Code, born under the influence of French ideas, is seeking guidance in German law. The trend of the reform looks to him almost as a confession that Argentine people waited for 70 years for Berlin to tell them how to live with each other (comotenemos que entendernos con el projimo, T. IX, p. 668). He acknowledges the debt of the Argentine to West European civilization, but suggests that it is desirable to seek the solution of Argentine problems at home (busquemos en nuestro propio medio las soluciones a nuestras problemas). To him it is doubtful whether the draft code has a true Argentine character (afirme una personalidad argentina, p. 669).

If Professor Sanchez is right in his judgment the new code, if enacted in the form of the draft before us, will make the work of Argentine judges very difficult. But there is another difficulty—inherent in every code—that no code can provide a clear and unambiguous solution for every concrete case which can come before the courts. The Argentine Civil Code of 1871, therefore, provides that " if a question of civil law can not be resolved either by literal interpretation (por las palabras), or by the spirit of the law, principles of analogous laws shall be adopted (se atendera) ; and if even then there should be doubt as to the (solution of the) question, it shall be resolved by general principles of law with regard to the circumstances of the case " (Art. 16).

Professors Cossio, Aftaleon and Mercader discuss in great detail and with profound knowledge that Article of the Code and its implications (T. XI). The Draft Code contains a similar provision (Art. 7) perhaps better drafted.[1] Particularly Professor Cossio gives a most illuminating analysis of the problem, and suggests that, instead of the notion of " general principles of law," the judge should be guided by the idea of justice based on *national* conscience so that his judgment should be

[1] Analogous provisions are contained f.i. in the Civil Codes of Italy (Art. 3), Spain (Art. 6), Brazil (Art. 7), Holland (Art. 13). See for the discussion of the principle and the literature Lauterpacht *The Function of Law in the International Community*. 1933. P. 60 sq.

recognized as " a logical part of systematic consideration of our (Argentine) living law " (T. XI, p. 152).[1] In these days when nations have to battle for the free evolution of their respective civilizations and against mechanical " new orders " invented to serve one nation, Dr. Cossio's brilliant study and constructive suggestions are especially important. I do not see in his suggestions extreme nationalism—they impress me as respect for law as a national growth. South American countries have been prolific in codification of civil law. Already in 1830 Bolivia promulgated a Civil Code. Other countries followed and adopted codes drafted to a great extent under foreign influence. The constant changes of population by immigration, rivalry between French, Italian, Spanish and German intellectual influences, impact with the jurisprudence of the U.S.A.—all that prevented the gradual national evolution of civil law of the South American continent. South American jurists are conscious of the need to reform their law, not by introducing rules alien to its origin, but by developing its general principles formulated in their own countries and adapting the law to new social conditions. The publications of the Law Faculty of the University of La Plata are one example of the great work which is being done by South American jurists.

[1] See the important review by Professor Texo of Dr. Cossio's book *La Plentitud del Orden Juridico* 1939 in the *Anales* T. XI p. 748.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L., LL.D.]

The Russian Agreement and the Dominions.—The agreement of July 12 between the Government of the U.S.S.R. and His Majesty's Government in the United Kingdom constitutes in international law an alliance for mutual assistance in the war against Hitlerite Germany—a phrase new in treaty terminology, which may later raise obvious difficulties of interpretation. A change to Communism in Germany might justify in law the cessation of Russian co-operation, and render inapplicable the agreement that neither party shall negotiate or conclude an armistice or peace treaty save by mutual agreement. It was contemporaneously announced that, though the agreement was signed only for the Government of the United Kingdom, it was concluded in consultation with the Dominions and had their full approval. The agreement, of course, is of vital importance to the Dominions, for it rules out the possibility of the conclusion of any peace with Germany which secures in fact peace between that country and the U.S.S.R. It was, therefore, constitutionally proper that, as the agreement had the consent of their Governments, they should have been made formally parties to it.[1] The difficulty, however, which prevented this being arranged was formidable. The constitutional law of the Commonwealth admits the unfettered prerogative of the Crown to conclude treaties of alliance, and the conventions of the constitution permit a ministry, which is certain of its control over the House of Commons, to conclude such a treaty, and to agree therein to dispense with ratification, as was done in this case by a protocol to it. But historical conditions in the Dominions have developed the usage by which any treaty of such a kind ought to be approved by Parliament, and be subjected for approval before ratification and, as it was desired to give immediate effect to the treaty, this course of action was obviously impossible. The situation points to a defect in the constitutional position of Dominion ministers. On principle they should be responsible to their Parliaments for any action, but, except indirectly, they cannot be challenged for concurring in British action, although in fact it may deeply affect the Dominions. Mr. Menzies and Mr. Fraser, the latter of whom took part in the deliberations of the British War Cabinet before the alliance was concluded, at once asserted the full support of their Governments for the decision.

The Diplomatic Representation of the Dominions.—Australia, having arranged diplomatic representation in Japan without materially affecting relations with that country, took the step of entering into like relations

[1] Dominion High Commissioners were present at the meeting of allied powers on June 12 which passed a resolution to continue the struggle against German or Italian oppression until victory was won. Britain has formal alliances with Poland and the U.S.S.R. by treaty, informal with the other belligerent states, including Ethiopa, whose adherence to the resolution was invited, as the Emperor has not yet a diplomatic representative in London.

with China, with which she shares the essential interest of avoidance of Japanese domination of the Pacific. New Zealand also has decided to be represented at Washington. The position of Canada is interesting ; she has sent a Minister to China and maintained diplomatic representation with the Governments of Belgium and the Netherlands as established in England, and has continued to maintain relations with the Vichy Government, as has the Union. The action of Canada has been naturally affected by the views of the United States, which has endeavoured by not breaking off diplomatic relations to exercise a moderating influence on the policy of France, despite the ever-increasing tendency of the Vichy Government to convert political and economic co-operation into military co-operation, as in the case of the aid given to Germany against Britain in Iraq, and the resistance offered in Syria, which was expected to be supplemented by German air forces.[1] It is also in accordance with United States opinion that arrangements have been duly made through the British Government to give effect to the desire of Argentina and Brazil to exchange missions with Ottawa, thus bringing Canada more closely into contact with the movement for the consolidation of relations between the States of North and South America.

The Inviolability of Secret Sessions.—The insistence of the House of Commons on privilege relative to proceedings in secret sessions was remarkably illustrated by the report of the Committee of Privileges[2] that the statement published in the *Observer* of May 25, which stated that members were satisfied with the progress of rearmament reported by the then Minister of Supply in a secret session, was a breach of privilege, though it was not deemed necessary to carry the matter further, once it had been made clear that nothing whatever must be said of such proceedings. In the Commonwealth when a joint secret session of the two Houses was held in March to receive very secret information regarding the military situation, Mr. Brennan of the Labour Party, and Mr. Cameron of the Country party, questioned the right to forbid members to reveal what was told in this way, on the score that it was the duty of a member to his constituents to keep them informed of whatever transpired in Parliament. But Mr. Curtin, the Labour leader, reminded the House that admission of the press to meetings of the Labour Party had been negatived on the ground that they should not inform their political enemies of their plans, and the Acting Premier made it clear that the invitation to the secret session was given on the distinct understanding that any member who accepted it would observe the obligation of secrecy.[3] The Dominion has shown reluctance to adopt such sessions, which even in Britain have been criticised as denying the public information vital to its understanding of and reaction to the necessities of greater efforts at rearmament.

House of Commons Disqualifications.—An important constitutional issue arose in consequence of the desire of Mr. Churchill to alter the system under which the British High Commissioners in the Dominions have been civil servants, and in place to substitute men with Cabinet experience. No technical difficulty affected the sending of Lord Harlech to the Union, but normally Mr. Malcolm MacDonald and Sir R. Cross would have lost their seats on appointment to Canada and Australia, on

[1] Similarly Canada has stationed a Consul at St. Pierre.

[2] H.C., 94, 1940–41.

[3] House of Representatives Debates, March 12 and 13, 1941.

the ground that they were accepting offices of profit under the Crown. The position was anomalous, because it appeared that Sir Stafford Cripps and Sir Samuel Hoare by acting as Ambassadors to Russia and Spain had not incurred disqualification. By making it a matter of confidence Mr. Churchill secured approval of the passing of the House of Commons Disqualification (Temporary Provisions) Act, 1941, which exempts from disqualification persons certified by the First Lord of the Treasury to be required to be employed under the Crown for war purposes. But a Select Committee to investigate the question of disqualifications had to be conceded, for the House was critical. The active functioning of that body is obviously demanded by the necessity of bringing constant pressure on the Ministry to remedy defects in its war effort, and to secure the maximum protection for the interests of the people.

The National Service Act, 1941.—This Act introduces a new principle, though one easily defensible. It extends to every person, liable under the National Service (Armed Forces) Act, 1939, to be called up for service in the armed forces of the Crown, an obligation to serve, if called up for civil defence, which covers employment in the police war reserve, or any civil organization established for forestalling or mitigating attacks by the enemy. At the same time it subjects to such obligation any person registered conditionally as a conscientious objector. The justification for that decision is overwhelming, for experience has shown that with or without lack of will on their part many persons conditionally registered have failed to carry out the conditions of exemption. Moreover, provision is now made to provide penalties for refusal to submit to medical examination, and for failure, without reasonable cause, to carry out the condition on which he was registered as a conscientious objector. The result is in large measure satisfactorily to provide for the case of those who have genuine conscientious scruples against armed service ; under the principal Act such persons were able to avoid in many cases rendering any service to the State, their exemption causing much resentment to men who, taken for army service, saw conscientious objectors profiting at their expense, and refusing even to give assistance in case of air raids. Even now they will not be required to join the police force, as the police may on occasion be expected to carry arms. A useful provision requires the transfer of persons registered under the principal Act in the Military Register, but to be employed only in non-combatant duties, to the register of conscientious objectors. Reinstatement in civil employment is required for persons called out for civil defence as in the case of those taken into the armed forces of the Crown.

Compulsory Service for Women.—Women are not liable for conscription to serve in the armed forces of the Crown, A.T.S., W.A.A.F., and W.R.N.S., but may be required by the Minister of Labour and National Service to undertake other forms of war service ; if unwilling to do so, they can appeal to an appeal board ; if refused exemption they will be liable, like men, to fine and imprisonment by the civil courts.[1] In the case of the A.T.S., since July 1 the Army Act has been applied, under which absence without leave involves liability to arrest by the civil power and to trial by court-martial.[2] The W.A.A.F. is in like position,

[1] Mr. Bevin's rulings, *The Times*, August 26, September 1, 1941.

[2] *The Times*, September 2, 1941. The merits of this policy are open to dispute ; it certainly deprives the Forces of valuable recruits, and the principle lacks any popular mandate.

creating a revolutionary precedent. No compulsion on women was imposed in the war of 1914–1918.

The Crown's Privilege in respect of Documents.—The Court of Appeal in *Duncan and others* v.*Cammell Laird & Co.*[1] has adopted a very wide view of the right of a Minister to withhold documents whose production in his opinion would be against the public interest. The documents in question related to the loss of the submarine *Thetis,* and disclosure was asked by claimants in respect of the lives lost against the firm, whose refusal to produce rested on an affidavit by the First Lord of the Admiralty. It was vainly sought to persuade the court to examine for itself the papers and decide how far the Admiralty claim should be allowed, on the strength of the Privy Council ruling in *Robinson* v. *State of South Australia* (No. 2).[2] The Court of Appeal clearly viewed this precedent without enthusiasm. MacKinnon, L.J., took the natural step of insisting that the issue there was one of a commercial claim against the Government, and the demand for privilege was not made on oath or in any proper form. Goddard, L.J., insisted on the view of Scrutton, L.J., in *Ankin* v. *L.N.E.R. Co.*[3] in favour of accepting as final the Minister's view ; the right to examine a Minister who thus claimed, suggested in *West* v. *West*[4] by Vaughan Williams, L.J., should be restricted to a case where, as there, doubt might exist whether the document involved was sent to the Lord Chamberlain in his official capacity or as a private person. Du Parcq, L.J., admitted that difficult cases might arise, as in *Admiralty* v. *Aberdeen Steam Trawling and Fishing Co.*,[5] in which the Admiralty sued, and wished to withhold documents, but agreed that normally the Minister's view must prevail. The case evidently strengthens the British rule against questioning ministerial declarations. But its equity is not wholly apparent.

Statute Law and the Crown.—The decision of Rowlatt, J., in *Att.-Gen. of the Duchy of Lancaster* v. *Moresby*[6] that the Courts (Emergency Powers) Act, 1917, s. 1 (2) applied to a contract to which the Crown was a party, though the Act did not in terms bind the Crown, has always been doubted. In *Att.-Gen.* v. *Hancock*[7] Wrottesley, J., questioned its validity in relation to the Courts (Emergency Powers) Act, 1939, but held that in any case it had no application to the Crown's right to recover income-tax. Morton, J., in *In re Hutley's Legal Charge ; Barnes* v. *Hutley*[8] had to deal with a case where the debt involved must be deemed to be a contract debt, and he found it necessary definitely to reject the reasoning of Rowlatt, J., on the base of the well-known rule that, if an Act of Parliament would otherwise divest the Crown of its property, rights, interests or prerogative, it is not to be construed as applying to the Crown, unless it is mentioned therein expressly or is necessarily implied.

[1] 57 T.L.R., 392.

[2] [1931] A.C. 704. See *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. iv, pp. 261, 262.

[3] [1930] 1 K.B., 527.

[4] (1911) 27 T.L.R., 476.

[5] 1909, S.C., 335.

[6] [1919] W.N., 69.

[7] [1940] 1 K.B., 427.

[8] 57 T.L.R., 507.

The Status of a British Ship on the High Seas.—The Army Act forbids the trial by court-martial of a man accused of murder in England. Hence in *R.* v. *Finlayson*[1] it was pleaded that trial by court-martial, when the accused had committed the alleged crime on board a British ship was forbidden. The rule that English courts have jurisdiction over crimes committed in such ships was alleged to depend on the fiction of law that such a ship was part of the territory of England. This was supported by the dicta of Holroyd and Best, JJ., in *Forbes* v. *Cochrane,*[2] which established that a slave who reached a British ship on the high seas attained freedom just as in *Sommersett's Case*[3] he attained it by living on English soil. But, as Humphreys, J., pointed out, all that the case involved was that English law applied to a British ship on the high seas. Nor was a dictum[4] of Blackburn, J., suggesting that a ship was a floating island, shown to express accurately his real meaning ; in the same case he had expressed the view that British subjects on British ships fell within the jurisdiction, though they were not within the territory of Great Britain. Oliver, J., who concurred in rejecting the plea, cited the dictum of Lord Stowell: " The great and fundamental principle of British jurisprudence is, that ships upon the high seas compose no part of the territory of a state. The surrender of this principle would be a virtual surrender of the belligerent rights of this country."[5] It may be added that in *Chung Chi Cheung* v. *R.*[6] the Privy Council disapproved the doctrine that even a public ship is a part of the territory of the flag it flies, which in no way disagrees with the practice of treating such a ship as constituting part of the parish of Stepney. (See Dicey and Keith, *Conflict of Laws* (1932), p. 54.)

D.O.R.A. and the Emergency Powers (Defence) Acts, 1939-1940.—Those who thought D.O.R.A. too drastic will find more to complain of in the Acts which have superseded it, as interpreted, no doubt correctly, in *R.* v. *Comptroller-General of Patents ; ex parte Bayer Products, Ltd.*[7] The Act of 1914 was content to give powers for securing the public safety and the defence of the realm, and this left it open to contend that any particular regulation could not be one to serve either purpose. This was admitted in *R.* v. *Halliday*[8] by Lord Atkinson, though with the other Lords save Lord Shaw he held that the question did not rise in that case, the security of the realm being clearly at stake. In *Chester* v. *Bateson*[9] the Court did hold that a regulation forbidding the taking of proceedings to recover possession of a house, without the permission of the Minister, so long as a war worker was resident therein, was invalid as neither reasonable nor necessary for the purposes of the Act. The new Acts go further in two regards. The objects for which power to make defence regulations is given are extended to the maintenance of public order, and the efficient prosecution of any war, and for maintaining supplies and

[1] 57 T.L.R., 270.

[2] (1824) 2 B. and C., 448.

[3] (1771) 20 St. T., 1.

[4] (1868) 1 C.C.R., 161.

[5] Appendix to Report of Nationalisation Commission, p. 32.

[6] [1939] A.C., 160.

[7] [1941] 1 A.K. E.R., 677.

[8] [1917] A.C., 260, at p. 272.

[9] [1920] 1 K.B., 829.

services essential to the life of the community. It would obviously be very difficult to rule out any action under so wide a power. But in addition, the power given to His Majesty in Council is to make regulations "such as appear to him to be necessary or expedient." It is impossible to deny that the criterion of power under the Acts is not whether the regulations are necessary or expedient, a point which the courts could examine, but whether they appear so to His Majesty, and it is only natural that the courts should refuse to investigate whether the conclusion of the Crown was justified. This view is entirely in accord with the cases under Defence Regulation 18B, where the courts have refused to investigate the issue whether there existed justification for the conclusion of the Minister that circumstances existed justifying detention and that detention was desirable.

Detention under Defence Regulation 18B.—The cases on this topic have been steadily of one tenor. It was, indeed, found *In re Budd*[1] that the detention of Captain Budd could not stand, for the original order of detention, of which an incorrect copy was given to him, not only applied in vague terms to 25 persons, but omitted the essential statement that it was held by the Secretary of State necessary to detain him. All were released, but Captain Budd and others were rearrested on amended orders, and *habeas corpus* proceedings failed,[2] Lord Caldecote and Macnaghten, J., following the principles in *In re Lees*,[3] Stable, J., dissenting. But in *Stuart* v. *Anderson*,[4] a claim based on false imprisonment, Tucker, J., in effect, accepted the wide ambit of the Minister's powers contended for by the Attorney-General, and in *Ex parte Green*,[5] Scott, Mackinnon, and Goddard, L.JJ., made it clear that an order *ex facie* regular will be accepted as conclusive justification for detention.

Arrest on Suspicion of Foreign Felony.—On the other hand, the liberty of the subject has been effectively vindicated by Cassels, J., in *Diamond* v. *Minter*,[6] in which the plaintiff successfully brought an action for false imprisonment, because he had been arrested by error in place of one Forbes, against whom a warrant had been issued under the Fugitive Offenders Act, 1881. As the Constables Protection Act, 1750, does not cover the arrest of a wrong person, it was necessary to claim that the police had reasonable and probable cause to hold that the prisoner had committed outside the country an offence which, if committed in England, would have been a felony. Such a common law power was supported by *Mure* v. *Kaye*,[7] and a dictum of Brett, L.J.[8] But the court held that this was inadequate authority, and that extradition and surrender of fugitive offenders must be deemed to rest essentially on statute, a view fortunately in accord with that taken in *Brown* v. *Lizars*[9] by Griffiths,

[1] *The Times*, May 28, 1941.

[2] *The Times*, July 3, 1941.

[3] [1941] 1 K.B., 72. See *Journal of Comparative Legislation*, Third Series, vol. xxxiii, pt. i. pp. 76 ff.

[4] *The Times*, June 27, 1941.

[5] *The Times*, July 31, 1941.

[6] 57 T.L.R., 332.

[7] (1811) 4 Taunt, 34.

[8] *R.* v. *Weil*, (1882), 9 Q.B.D., 701, at p. 706.

[9] (1905) 2 C.L.R., 837.

C.J., and Barton and O'Connor, JJ., of the Commonwealth High Court.

Arrest under the Allied Forces Act, 1940.—*In re Amand*[1] was decided the issue of the right of the police to arrest an absentee from the Netherlands forces in Britain. Mr. Amand, who had joined those forces in obedience to a royal decree made in August, 1940, after obtaining leave, refused to rejoin on the ground that the decree, being made out of the Netherlands, was not within the royal authority. This was denied by the Netherlands Government, which contended that he was legally a member of the forces, and that his arrest was therefore legal under the Act of 1940, and the Order in Council thereunder of October 11, 1940, which applied certain parts of the Visiting Forces (British Commonwealth) Act, 1933. The court held the regularity of his membership of the forces made out and his detention, therefore, under s. 154 of the Army Act as applied by the Act of 1933 legal. The decision is interesting as showing that a mere assertion of membership of a foreign force does not bind the courts, a rule of course equally applicable to Dominion visiting forces.[2]

The Protection of Property Rights.—It is interesting to note how much more ready are the courts to safeguard property rights than personal freedom. In *John Fowler and Co. (Leeds) Ltd.* v. *Duncan*[3] the power of the Minister of Supply to appoint a controller of an undertaking under the General (Defence) Regulations, 1939, s. 55, was duly admitted and a wide interpretation given to his powers of interfering in matters of finance. But Farwell, J., ruled that his power did not extend to ordering the company to increase its overdraft with its bankers, which it was most reluctant to do, because it would increase the risk of the bank taking steps to appoint a receiver or otherwise to enforce its security. The bank, indeed, was willing to make advances, but only with a Government guarantee, which the controller could not bind the Government to give. It was held therefore that to order the company thus to act would go beyond the fair meaning of its power to control financial transactions in connexion with the undertaking. The point is a narrow one, and it may be noted that a new regulation (78), vainly questioned in Parliament, has given a controller power to displace a director who obstructs his work.

The Discretion of Local Authorities.—Satisfaction must be felt with the decision of the Court of Appeal not to allow the rights of local authorities to be diminished without express Parliamentary authority[4]. The Local Government Staffs (War Service) Act, 1939, gave power to local authorities at discretion to make up the pay of employees serving in the Forces. A claim was made that the Bolton Corporation should agree to do so, and, on its refusal thus to fetter its discretion, the Minister of Labour was asked to refer the issue to the National Arbitration Tribunal as a trade dispute under the Conditions of Employment and National Arbitration Order, 1940. Strangely enough, the Minister did so, and it was necessary to seek an order to prohibit the tribunal dealing with the issue. An order was refused by a majority in the court below, but the decision was emphatically reversed by the Court of Appeal, which negatived the

[1] *The Times*, May 24, 1941.

[2] See Keith, *Journal of Comparative Legislation*, Third Series, vol. xv. pt. iv, p. 256.

[3] 57 T.L.R., 612.

[4] *R.* v. *National Arbitration Tribunal, ex parte Bolton Corporation*, 57 T.L.R., 644.

possibility of thus circumventing the Act of 1939. MacKinnon, L.J., pointed to the desirability of vindicating democracy against dictatorship. Bennett, J., further animadverted on the carelessness of the Minister in accepting as a trade dispute a difference between the National Association of Local Government Officers and the Corporation, rejected the suggestion that the Order covered a case where there was not even the threat of a strike, and negatived the view that all employees of the Corporation could be deemed to be workmen as statutorily defined. It is, of course, patently unjust to compel local authorities to make up Service pay, when that presses unduly on ratepayers seriously affected by war conditions.

Care of the Deaf.—Through the courtesy of the American Society of the Hard of Hearing, a copy has been received of a Digest of State Laws[1] affecting that section of the community. It has been prepared by the Legislative Reference Service of the Library of Congress in anticipation of the subject being before the Legislatures of many states. The study covers the Administrative Acts, Orders and Policies, as well as the texts of the laws affecting those who are either deaf or partially so. In that way it covers legislation which indirectly affects them such as the laws which deal with the physically handicapped in general. The main grouping of the Digest is that it opens with the discovery and prevention of hearing defects in children, then proceeds to their education, and that is followed by their vocational rehabilitation. The other main subject to be included in the summary is the extent to which defect of hearing is an obstacle to the issue of licences for driving motor vehicles.

[1] *The Hard of Hearing and the Deaf. Digest of State Laws.* (Washington: Government Printing Office.) Pp. v., 112.

NOTES.

Back Numbers.—Owing to the destruction of the chambers occupied by the Society there has been a considerable loss of back numbers. The Hon. Secretaries would be glad to hear from any members who are able to spare their copies, especially those before 1925. There is a constant demand for sets and so far as the Society is able to meet it the orders at the present time are particularly welcome as they are invariably required for export.

Change of Address.—Attention is drawn to the fact that the Society has had to change its address twice owing to enemy action and former correspondents are requested to note the present address at 28, Essex Street, London, W.C.2, since it is observed that some communications, especially publications, which were received regularly no longer come to hand.

Canadian Law of Trade Marks.—It is regretted that the publishers of Mr. Harold G. Fox's book on the Law of Trade Marks were incorrectly stated in the last issue. The book is issued in the Legal Series of the University of Toronto Press.

Conference of the Inter-American Bar Association.—The formation of the Inter-American Bar Association is an event which must be cordially welcome to the members of the Society of Comparative Legislation since its primary object is to advance the study of comparative law and it is also concerned " to promote uniformity of commercial legislation and to further the diffusion of the knowledge of the laws of the different countries throughout the Americas." From the Presidential Address of Dr. Manuel Fernandez Supervielle, dealt with in an article by Mr. Otto Schoenrich in the *Canadian Bar Review,* may be noticed the points which he made in respect to the study of comparative law assisting international friendship. " How can," he asked, " the laws of any particular country affect its relations with other countries?" Some of the many answers which might be made included, as he suggested, the following:—

" (1) Friendship is promoted by mutual understanding. Now then, the law of a country represents the life of the country ; it reflects the country's thoughts, its aspirations, its activities, its culture, its faults. To know and understand the law of a country is an excellent means of knowing its life and its soul.

(2) The study of the laws of other countries frequently indicates innovations which might profitably be adopted in the legislation of one's own country, to provide solutions for conflicts or improve the condition of the citizen.

(3) Uniformity in commercial legislation and analogies in other laws which might affect citizens of other countries facilitate intercourse, avoid

friction, and tend to strengthen bonds of friendship. If the laws of two countries are greatly dissimilar, the countries are apt to be very dissimilar ; whereas the more similarity is to be found in their respective laws, the more bonds of union and friendship may be expected to exist between them."

Dealing especially with the Americas he noticed that the branch of law which has contributed more than any other agency to foster sentiments of solidarity among the nations of the Western Hemisphere is that dealing with the formation and functions of government, that is to say, constitutional law. On the other hand, in the opinion of the learned President the failure to give greater attention to the study of the laws regulating the private life of the individual citizen, that is, to comparative private law, has in the past occasionally presented obstacles to the intercourse and understanding between American countries. " Not only," he went on to say, " are the laws of the Western Hemisphere divided into two great systems, but also there are important differences in the laws of the several countries. The two great systems are the Anglo-American system of law, in force in the United States, which is based on the law of England, and the Roman-French-Hispanic system, a heritage of Rome, transmitted through the Hispanic peninsula and France, which is the system of Latin America."

Another cause which has produced further differences between the laws of the various countries was the industrial revolution, which has transformed the world within the last century. " The Roman law, the Spanish law, the French law, the English law," continued Dr. Supervielle, " all developed during the many centuries when land was the basis of wealth and private activities were of a simple nature. The advent of the machine age, the enormous expansion of trade, the establishment of complicated industrial entities, the creation of many new forms of wealth far more important than land, gave rise to a multitude of new legal problems, and brought about fundamental modifications and new conceptions in Anglo-American law. Corporation law was expanded in a measure which could not have been conceived 150 years ago ; the doctrine of trusts was applied to conditions entirely beyond the imagination of its originators ; old legal devices were transformed and new ones invented to meet the requirements of modern business.

The economic changes extended to Latin America also, but there the developments proceeded with less rapidity. The need for new legislation being less urgent, the modifications in Hispanic-American law were being made more slowly. Some countries at length introduced innovations, but they were often of a limited nature. The result was a great divergence of the laws with respect to some of the most important manifestations of modern business life, a divergence not only between the Latin American countries and the United States, but among the Latin American countries themselves. Some of these differences constituted barriers to commercial intercourse and consequently obstacles to Pan-American solidarity."

Dealing especially with the subject of corporation law, the President observed that a good deal of divergency exists in the various countries. " In some of the countries," the President states, " antiquated provisions still prevail, in others, the Government exercises what would appear to be excessive supervision. In this connection the subject of corporate bond issues has occasionally given rise to discussion. In the twenty Latin

American republics, the law of only thirteen refer to bond issues by corporations in general, and most of these provisions are quite brief. Only four of the twenty have comprehensive laws on the subject, namely, Argentina, Mexico, Brazil and Chile ; also Colombia with respect to certain aspects of such issues. The lack or conflict of legal provisions has occasionally created problems for interests which either directly or through local companies owned property in Latin American countries and desired to encumber it as security for bond issues."

Another subject in which there are substantial differences in the laws of the several countries is that of domestic relations. Observing that in the United States the diversity of law in the several States sometimes makes it possible for a person to be at the same time considered as married in one State and divorced in another, he went on to remark that a similar situation prevails in various South American countries. "Five Latin American countries, Argentina, Brazil, Chile, Colombia and Paraguay, do not recognize absolute divorce, whereas others have very liberal divorce laws. Some of the confusion may be cleared up under the rules set forth in the excellent Code of Bustamante, but in practice new questions constantly arise. These problems are especially difficult when they concern property rights of spouses who marry in one country and establish their domicile or acquire property in another. Unless the parties make special stipulations on the subject of their property, some countries consider marriages to be contracted under the regimen of community property, whereas in other countries the marriage is deemed to be contracted with separation of property. In the case of foreigners, some countries apply the national law of the parties, others the law of the domicile, others the law of the place where the property is situated. Some courts consider that the laws relating to the property rights of spouses should be classified as 'laws concerning the status and capacity of persons,' in which case usually the national law is applied, whereas others classify such laws as 'laws relating to property,' in which case the local law is usually applicable, especially when real estate is involved."

It is clear that in this state of affairs there is ample scope for such a body as the Inter-American Bar Association to exercise its influence in harmonizing the laws of the different countries, and so join together and strengthen the commercial, intellectual and moral ties between them.

Jewish Divorce in Palestine. —The *Juridical Review* for June, 1941, contains an interesting contribution on The Application of Jewish Personal Law by Mr. Bentwich, than whom a more eminent authority upon the subject is not to be found. The article covers the application of Jewish law in British, French and Italian territories, but in this note we are solely concerned with Palestine. There are few countries in which law is more widely applied on a personal basis, a fact due to the circumstance that the population so largely consists of Moslems and Jews and that each of these groups is devotedly attached to an unalterable body of law of religious origin. Indeed, it is not perhaps unfair to say that devotion to the religious law may be sometimes stronger than the regard for the religion out of which it grew. As Mr. Bentwich points out, marriage and divorce (*inter alia*) were, by the Palestine Order in Council, 1922, treated as matters to be dealt with by the Religious Courts of the community to which the parties belonged. There is no common law of marriage in

Palestine, and the Civil Courts are expressly excluded from jurisdiction in divorce or nullity. It was no doubt assumed that immigrant Jews would readily adopt the citizenship of the National Home and would thus become subject to the jurisdiction of the local Rabbinceal Courts. In fact, however, there has been hesitation on the part of the Jewish immigrants to adopt this course. As most of the immigrants came from Eastern Europe the number of Polish, Czecho-Slovakian, Roumanian, Lithuanian, etc., subjects in Palestine was, and presumably, still is considerable, and in the present unhappy state of affairs this fact must cause some embarrassment to the Administration. Since such persons are " foreigners " they are subject to civil and not to religious jurisdiction in matters of personal law generally, and this jurisdiction the civil courts are, by Article 64, directed to exercise in accordance with the law of the nationality of the foreigner concerned. The exclusion of foreigners from the religious jurisdiction, which may in some cases be broken by consent of the parties, is emphasized as regards divorce by an express provision that Courts of Religious Communities (other than Moslem Courts) shall not have power to grant a decree of dissolution of marriage to a foreign subject. (Article 65.) As the civil courts have no jurisdiction in divorce, it appears that foreigners (unless Moslems) cannot secure a divorce in Palestine.

The " ingenious lawyer " is, however, awake. Mr. Bentwich tells us that " it was successfully urged before the Palestine Court of Appeal in the case of *Volkenberg* v. *Volkenberg* that a divorce under Jewish law is a contract of mutual consent of husband and wife recognized as valid by the national law of Jews from Poland," etc. As, therefore, " a decree of dissolution " was not required and the " national law " of the parties was to be applied, it seemed to follow that a Jewish divorce could be declared valid by the Civil Court in Palestine in pursuance of their ordinary jurisdiction over foreigners in matters of personal law.

The case, however, as reported in *Pal. Law Reports*, 1934-35, at p. 365, hardly seems so conclusive. The appellant, a Jew, claiming to be a Czecho-Slovakian subject, was sued by his wife and child for maintenance. He pleaded that he had previously divorced her under Jewish law and that the law of Czecho-Slovakia recognized such a divorce as valid. No witness was called to prove this, nor was the law proved in any other way. The Appeal therefore failed, and the decision of the Court below, granting maintenance, was confirmed. There was, consequently, no question as to Jewish law before the Court for decision. But the Court, nevertheless, seized the opportunity to deliver a disquisition which, with respect, seems otiose, as to what in their opinion would have followed had the Appellant proved that he was a Czecho-Slovakian and that the Czecho-Slovakian law recognised the validity of a Jewish divorce. No evidence as to Jewish law was, according to the Report, laid before the Court. The opinion given must, therefore, be regarded as of no higher authority than an extra-judicial opinion of the respected Jewish judge who was a member of the Court. It is not within my province to criticize it as a statement of Jewish law. On the whole, it coincides with the views expressed by Dr. Daiches in his article on the subject in our eighth volume.[1] It may, however, be pertinent to remark that the Rabbinical authorities appear to play an important " confirming " role in a Jewish divorce, for which there is little or no precedent in the case of a Moslem divorce. So dominant is this role, that Dr. Daiches in his article speaks

[1] *Jour. Comp. Leg.* Third Series VIII., pp. 215ff.

of the Beth Din of London as having "granted divorces (*i.e.* allowed divorces to be given)." This may be pertinent as the argument advanced in *Volkenberg* v. *Volkenberg* depended upon the suggestion that a Jewish divorce was entirely extra-judicial. It is, indeed, noteworthy that the Order in Council, when denying to ecclesiastical authorities jurisdiction "to grant a decree of dissolution of marriage to a foreign subject," thought it necessary, as above stated, to make an express reservation in favour of the Moslem Courts. Presumably, therefore, the well-established English phrase "grant a decree" was used in a wider sense than its strict import and may have been intended to cover any judicial recognition of a divorce. However this may be, the importance of *Volkenberg* v. *Volkenberg* must not be exaggerated. Apart from the fact that it is not a judicial decision upon the issue as to the validity in Palestine of a Palestinian divorce of foreigners in Jewish form, its possible application is very limited and is likely to become more so. The opinion expressed in the judgment can have no application unless the validity of a Jewish divorce is recognized by the national law of the parties.

In this connexion Mr. Bentwich raises the curious point as to the position of British subjects (Jews) who arrange in Palestine a divorce in Jewish form. It seems to be assumed—no judicial authority is cited—that a British subject who accepts Palestinian citizenship does not thereby lose his British nationality "because he does not change his allegiance." Presumably, however, the Courts of Palestine must invariably treat such a person as a Palestinian citizen. For in Palestine the Palestine Citizenship Order in Council, 1925, is the authoritative law, and it is there laid down (Article 8) that "a person to whom a certificate of naturalization is granted . . . shall be subject to all obligations, duties and liabilities to which a Palestinian citizen is entitled or subject." The fact that the British administrative authorities are still prepared to treat the *de cujus* as a British subject cannot affect the binding force of the Order in Council in the judicial sphere. If this be so, the Palestine Courts may treat as valid a Jewish divorce arranged in Palestine between two Jewish British subjects not domiciled there. But a prudent lawyer would, I think, advise his Jewish client not to rely upon such a divorce if he or she proposes to re-marry and settle down in England.

F. M. G.

The *Renvoi* in Palestine.—In *Kotia and another* v. *Nahas* (57 T.L.R.619) the Judicial Committee affirmed a decision of the Supreme Court of Palestine determining a conflict between the Moslem (Sharia) law and the Civil (Ottoman) law as to which should govern the rights of succession to Palestine Mulk Land, where the *de cujus* was not a Palestinian citizen. The Succession Ordinance, 1923, section 4 (iii) (*a*), provides that where the deceased is either a foreigner or, not being a foreigner, is neither a Palestinian citizen nor a member of one of the religious communities, "mulk" land (as contrasted with "miri" land)[1] shall be distributed in accordance with the national law of the deceased. In this case the deceased was a national of the Lebanese State and was not a member of one of the "religious communities," and it was admitted that in the Lebanese State Moslem Law is the *lex situs*. Section 4 (iii) (*c*) further provides that "where the national law imports . . . the law of the situation of an immovable the law so imported" shall be applied. For the purpose

[1] Mulk land is land in absolute ownership. Miri land is land of which a bare ownership remains in the State.

of this case the law of Palestine, if so imported, was taken to be found in the provisions of the Ottoman Law of Succession of 3 Rabi el Awal A.H. 1331. A counter suggestion was, indeed, put forward and rejected by the Court. As the rejected suggestion turned upon the interpretation of local legal provisions it need not be further pursued here.

The problem remaining was, therefore, to determine the meaning of the phrase " national law." It was argued that the national law of the deceased was " the law which the Courts of the nationality of the deceased would apply to the intestate succession to land of their own nationals in their own country." To this their Lordships demurred, holding on the contrary that " in the English Courts phrases which refer to the national law of a propositus are *prima facie* to be construed not as referring to the law which the Courts of that country would apply in the case of its own national . . to property in its own country, but to the law which the Courts of that country would apply to the particular case of the propositus having regard to . . . the situation of the property in question." Evidence before the Court showed that the Lebanese Courts would apply the *lex situs*, *i.e.* in this case, the law of Palestine. The conclusion in favour of that law was confirmed by the provisions of sub-section (iii) (*c*) above mentioned, and, indeed, this statutory *renvoi* might, it may be thought, have rendered unnecessary some of the justifying arguments in favour of the acceptance of the *renvoi* in this case.

From the point of view of the law of Palestine the decision is of special interest as conforming to the view which I have elsewhere expressed, that the provisions of the " Ottoman Law " form the " Common " law of succession in Palestine and are to be applied generally if no express exception can be alleged.

In view of the statutory provision favouring the " renvoi " the approval of the *renvoi* doctrine on the part of their Lordships may, perhaps, be regarded as " obiter." It is none the less significant, based as it was on deliberate citation of the more recent English decisions.

Palestine is, of course, not alone in applying the national law of the *de cujus* to determine succession to immovables, but there, as in Egypt, the choice of the law for this purpose is not the consequence of legal theory but a survival of ideas generated by the system of Capitulations. The situation in *Kotia* v. *Nahas* resembled that in *Re Ross* [1930], 1 Ch. 377, except that the immovables in question were situate in the forum and not in the foreign country. *Re Ross* was among the cases upon which the Judicial Committee relied.

The decision in the case under reference accords, there can be little doubt, with legal convenience and, so far as such existed, presumed expectation. It is usually convenient that the *lex situs* should govern succession to immovables, and the interested parties may normally be assumed to expect its application. In this case, however, its choice depended upon an acceptance of the *renvoi*. And, though the *renvoi* theory in the sense in which it was defined in *Kotia* v. *Nahas*, as above quoted, appears now to be sanctified by the English jurisprudence its value and convenience are disputed by the doctrine. A recent article by Dean Falconbridge illustrates this.[1] This learned writer there examines at some length the practical results of the decisions in the chain of English cases down to *In re O' Keefe* [1940] Ch. 124; 56 T.L.R. 204, and submits that English judges have lost their way " in a labyrinth into which they have

[1] In *Canadian Bar Review*, May, 1941.

gratuitously entered" and that "they should, as far as possible, save themselves the trouble of making imaginary journeys to foreign countries for the purpose of adjudicating as if they were foreign courts." It must be confessed that an examination of the cases from the point of view undertaken by Dean Falconbridge, does appear to justify the conclusion that the English Courts have failed "to find by the use of the *renvoi* solutions which are of practical utility or intrinsic merit." And, ingenious and seductive as the idea may be that the Court of the forum should strive to administer the same "justice" as would be given by the "home" court, is this really possible? In this connexion Dean Falconbridge points out the special danger which arises from the existence of the English rule that "foreign law is treated as a matter of fact which must be proved by the party who relies on a provision of foreign law." The English practice as regards employment of expert evidence is in many respects obnoxious to criticism. In this special connextion the results may be serious. I have previously in this Journal referred to my doubts[1] and respectfully endorse those of Dean Falconbridge. F. M. G.

Eugenic Sterilization.—The United States Department of Health has issued in its series of Reports a summary of the statutes and the decisions relating to sterilization. It excludes the punitive sterilization enactments, and therefore accords with the policy of the Eugenics Society of this country as set forth in the August number of their *Review*. There it is pointed out that "we leave the secure bases of established knowledge the moment we permit sterilization for any other than therapeutic or genetic purposes. If criminal tendencies were known to be transmitted by heredity and their mode of transmission were understood, the sterilization of properly selected persons could be advocated as a desirable eugenic measure. In the absence of such knowledge eugenic sterilization should be confined to the strictly limited range of hereditary mental and physical diseases and disorders for which it is usually advocated in this country." The statement continues, "that sterilization, as advocated by British eugenists is a voluntary operation, to be undertaken under due safeguards and only at the request of the person whose fertility has to be restricted; that it is not offered as an alternative to incarceration in an institution; that it is not a penalty for sin; that it is not an unsexing operation. Far from conflicting with 'natural and inherent rights,' sterilization must be regarded as an added liberty, as the best means that has yet been conceived for removing from afflicted persons the intolerable burden of unwanted and socially dangerous fertility. We cannot hope to make this view prevail if what we urge should be conferred as a moral right is enforced by the law as a punishment."

Legislation in the United States has been enacted in 29 States, in 2 of which it is voluntary and the other 27 are committed to a policy of compulsory sterilization of defective persons. The classification of the contents of the laws provides a comparison of their provisions and so shows, for example, the different limitations imposed by law upon the various types of surgical operations. The synopsis also sets forth the differences in the appointment or employment of officers to carry out their provisions. In half of them consent of a legal guardian and attorney is necessary to protect the rights of the individual. Another section deals with the different types of agencies appointed to administer the laws

[1] *Jour. Comp. Leg.* Third Series XIX., p. 145.

which involve an enquiry into the necessity for the operation and the composition of the tribunal regarded as necessary to give directions for the law to be put into operation. There is some variation in the nature of the procedure adopted by these various bodies, and evidence which is necessary to satisfy them. Then again there is the extent of the notice to be given before the law is put into operation, which in a small minority involves a decision in the nature of an order of a court. The summary observes that "probably in no other feature of sterilization laws is there such a great diversity as in the use of phraseology to set forth the basis on which persons shall be sterilized or, in other words, the purpose sought to be accomplished by the statutes." Examination of the table setting forth the details "shows that seven of the laws are silent as regards specific language to show the purpose or purposes for sterilizing selected persons, or merely mention the inadvisability of procreation by the persons as the basis, or that sterilization is deemed advisable and beneficial to the person. Other laws are more specific in this respect, and many of them contain various combinations of reasons, some more inclusive than others. While the primary purpose of all eugenic sterilization laws is, of course, the effort to improve the inborn or native qualities of a race or breed through preventing procreation by certain types of defective persons, it is particularly significant to note that in all except eight of the compulsory sterilization laws there has been included, as a basis for sterilization, the improvement in the condition of the person himself, and two laws include in the reasons for sterilization even improvement in the moral condition of the person." Some of the laws also contain a right to appeal to various bodies of which particulars are given in another table. The decisions of the courts summarized in this publication show that the legislation on the subject has encountered the difficulty as to whether it can be regarded as unconstitutional by affecting the fundamental civil rights of the individual and therefore a proper exercise of the police power by the legislatures. The net result of the decisions seems to have left the matter in rather an indeterminate condition though no obstacles have actually been placed in the way of carrying out the laws as enacted by the different States.

In Germany the Eugenic Law of July 14, 1933, was modified by an emergency decree on August 31, 1939, which provided that during the war sterilization was only to be applied when the danger of dysgenic progeny is especially grave. A series of test cases are summarized from a German medical journal in *The Lancet* of September 27, 1941. Their object was to emphasize that the decree does not diminish the force of the original law. The cases in which an appeal against a sterilization was refused include a woman with a condition of hearing bordering on complete deafness and a man convicted eleven times for offences due to drink. Not only complete blindness but also disabling loss of sight come within the Act.

State Laws of the United States.—The latest issue of the Index issued by the Library of Congress of the State Laws of the United States provides some interesting information in reference to the legislation which has been passed to meet the national defence emergency. The Council of International Defence have prepared a model law which has been adapted by various States, though with some variations. Connecticut, for example, allows a greater concentration of power and responsibility in

its " administrator of State defense " than seems to be contemplated by the model Act. A feature of the legislation is the provision which it has been found necessary to make for the housing of staff engaged in defence measures. This has been done in co-operation with the Federal Government and apparently it is thought that legislation extending until December 31, 1943, will be adequate to meet the immediate requirements. New Hampshire, for example, authorizes the housing authorities " to undertake the development and administration of projects to assure the availability of safe and sanitary dwellings for persons engaged in national defense activities." New York and North Carolina have similar laws. Some of the States have had to make special provision in reference to their highways in the furtherance of their national defence programmes, in particular North Carolina. That State also specially protects homing pigeons because of their value to national defence. In addition to the references to legislation the Index also includes resolutions which have been passed by the legislatures. Such, for example, as one which " endorses and approves the recommendations of President Roosevelt for preparedness for national defence and all possible aid, short of war, to Great Britain and other democracies in defending themselves against the totalitarian aggressor nations of Germany, Italy and Japan, and assures the President of the complete support of the people of North Carolina."

Annual Register.[1]—The Annual Register for 1940 was among the publications which escaped the last destruction of the Society's chambers. It is, however, representative of the appalling difficulties with which publishers have been faced during the attacks upon London. The publishers, Longmans Green & Company, were among those who suffered most seriously by the destruction of their stock and it is remarkable to find that the Annual Register contains all its well-known features. The section devoted to law is not long as there are other works of reference, particularly the *Survey of English Law,* which provide for the needs of those who have occasion to refer either to legislation or judicial decisions. This number contains some useful documents of international character and the publishers and all concerned are to be congratulated upon having maintained the high standard of this publication.

Youth Aid.—In the Reviews of Legislation of the last two years reference has been made to the laws passed in the Dominion and Provinces of Canada with the object of assisting the training of young people. It has always been among the objects of the Society, though it is not often able, to publish a report upon the operation of laws which make new departures. In the case of these Acts, however, it is possible to do so, as a comprehensive review has been made by the Canadian Department of Labour. It has been found that " the percentage of those trained who were placed in employment varies considerably from one province to another, owing to differences in the policies adopted provincially in selecting trainees. In some provinces the number enrolled in the classes was restricted to those for whom immediate employment was available. In other provinces the number enrolled for training was not confined to those to whom employment had been definitely promised on the completion of their course, but was based on the

[1] *The Annual R* ted by M. Epstein. (London: Longmans Green & Co.) Pp. xiv, 478. 35*s*.

assumption that if, and when, vacancies of a skilled or semi-skilled nature occurred, young people would be able to fill them if they had previously obtained the requisite degree of training. In addition to those placed through the Programme on the completion of their course, many found employment through their own efforts and it was one of the objects of the Programme to encourage the development of personal initiative on the part of the trainee." To the original Programme has been added one for War Emergency Training. The agreement with the Provinces provide that " those eligible to participate in training projects are young men and young women between the ages of 16 and 30 who are not gainfully employed and whose families are not in a position to pay the full cost of their training.

" As in previous years schedules of training projects proposed to be carried out in the various provinces were submitted by the provincial authorities, and if approved by the Dominion became integral parts of the agreements. The cost of the Youth Training Programme exclusive of administration are borne 50 per cent. by the Dominion and 50 per cent. by the province concerned, the provincial government making the expenditures in the first instance, the Dominion reimbursing the province for 50 per cent. of the expenditures following the receipt and audit of claims. Administration expenses are borne by the provinces.

The purposes of the Youth Training Programmes are to fit unemployed young people for employment by the following means:— (*a*) By providing theoretical and technical instruction, as well as practical work experience. (*b*) By improving their physical fitness. (*c*) By maintaining morale and instilling work habits and a sense of discipline. The projects carried on under the Youth Training Programme are not all designed to train young people for wage-earning employment. The rural classes are conducted with a view to giving young people from the farms the necessary training and knowledge to not only increase their efficiency as farm operators but to improve the standards of rural home life and develop rural leadership. The physical recreation centres are, of course, designed to build up physical fitness."

The special feature of the War Programme has been the training of aircraft mechanics for the Royal Canadian Air Force. The only province which could not undertake to participate was Prince Edward Island, so it was felt that " persons from that province should have an opportunity of serving in the war effort by assisting in the production of munitions and other war industries and arrangements were made whereby a specified number of trainees from Prince Edward Island would be enrolled in training centres in the provinces of New Brunswick and Nova Scotia. As its contribution to this training the provincial government of Prince Edward Island paid the cost of transportation for trainees attending these classes." Under the provisions of the Unemployment and Agricultural Assistance Act a similar financial aid was given by the Dominion towards the cost of approved forestry projects in the provinces of Prince Edward Island, New Brunswick, Quebec and British Columbia. Similar agreements were made to those in other departments of training. The Report on this branch of the work observes, " the work was laid out and supervised by trained foresters who also gave a considerable part of the class instruction. Every endeavour was made to obtain the services of foremen and sub-foremen who were not only competent from

the point of view of the work to be done, but who also understood boys and could give proper leadership. It was found that the success of the Project and the results obtained were very largely dependent on the type of supervisory personnel employed."

St. Lucia.—Mr. J. E. Salmon has made available for general use a "Law Finder," prepared as a ready means of reference to the legislation of the colony of St. Lucia. The underlying idea is to provide under a main heading the subject of the principal law and then give the subsidiary references to the amendments. The Finder also provides the date of publication of any subsidiary legislation putting into operation the ordinances. The compiler disclaims any intention of having provided an exhaustive detailed index of the laws of the colony, nevertheless those who have occasion to refer to them will find that he has supplied a useful guide which will much facilitate any reference.

Law Libraries.—The Law Libraries in London have suffered severely during the different aerial attacks. That adds to the seriousness of the loss involved by the destruction of the Law Library of the Royal Empire Society, which was the particular part of that fine collection to suffer when the building was bombed in April, 1941. The whole of this unique Library of 15,000 books of overseas law, with the exception of certain sections (such as the Indian section) kept in the Basement, was destroyed, and it is most desirable that an attempt should be made to obtain at least some of the more important of the books in order to re-establish a representative collection of overseas law.

The great strength of this library consisted in the long sets of Dominion and Colonial statutes and of Dominion law reports, many of which were complete. The South African law reports, in particular, represented many scarce publications that were not obtainable elsewhere and the same may be said in a perhaps lesser degree of the Canadian, Australian, and New Zealand law reports. In addition, large numbers of treatises and other books on overseas law were destroyed.

The Council of the Royal Empire Society are now engaged in collecting books destroyed in the general library and would be grateful for any help in the re-constitution of the law section. It is appreciated that it is not possible, of course, at the present juncture to despatch books from the Dominions and Colonies, but offers to send such books at the conclusion of the war would be greatly appreciated and should be made to the Librarian.

International Affairs.—There has been a considerable output of works dealing with some aspect of the international situation of which some might be regarded as being within the scope of the Society's work, while others have been kindly sent which are somewhat beyond its purview. A notable example of the latter is "Diplomacy and God"[1] by Mr. George Glasgow, whose contributions on foreign affairs in the *Contemporary Review* have been well known for some years. The sincerity of his line of thought, in which he would have diplomatic practice definitely based on the principles of the Christian faith, is bound to win respect, however difficult it may be to conceive that his proposals could be put into effective operation.

[1] "*Diplomacy and God*," by George Glasgow. (London: Longmans, Green & Co.) Pp. ix, 237. 7*s.* 6*d.*

While appreciating that diplomacy and the considerations arising from the failure to secure the maintenance of the League of Nations as embodied in the Covenant under the Treaty of Versailles must receive attention, the interests of the Society are more closely allied with the work of the technical organizations, which do not receive and have not received an adequate amount of attention even from some of those most likely to appreciate their value.

More than one of the publications issued by the Carnegie Endowment for International Peace have emphasized this fact. Among the latest of them is the report of a commission to study the organization of peace which sets forth as part of the reconstructed world organization various bodies dealing with such important subjects as health, social organization, control of narcotics, labour, communications and intellectual co-operation. The monographs in this volume include special contributions dealing with the International Labour Organization and Intellectual Co-operation, besides one devoted to other international organizations. The last shows the extent to which the official international bodies have derived their origin primarily from the activities of private international organizations. Along these lines—a member of the Society suggests—there is scope for the Society to develop the organization which would act for the Empire in the same way as the Commissioners of Uniform State Laws in the United States, and a similar body in the Dominion of Canada. Although a legal body cannot in any way be concerned with the propaganda in connexion with the great social problems requiring attention and embodied in the programme of the allies, yet by the dissemination of information about the operation of the laws, it is able to provide the experience of other countries and the record of experiments available as guides either by their failure or success.

One monograph in the Carnegie volume shows the wide variety of subjects which may receive attention in this way. The fundamental problems of international organization are considered by Mr. Quincy Wright in a carefully reasoned paper, in which, however, he rather suggests that some problems may be organized on a geographical basis. Side issues of this kind, however, are hardly germane to the main proposition that schemes of post-war reconstruction must definitely recognize the very important place to be occupied by the technical organizations of which the foremost are concerned with labour, health and agriculture. Each has been sponsored respectively by England, France and Italy, though the first two in particular have had the cordial co-operation and willing support of the United States. The three subjects will be in future the especial concern of the English-speaking countries, and it is remarkable that largely owing to the recent activities of the International Labour Organization, there is a considerable development of interest in them in South American States, so that through the revived activities of these organizations there is opportunity to give practical expression to the principles which are being upheld in the present conflict.

Broadcasting.—It may be worth while to place on record as a matter of historical interest that the subject of comparative law first appeared in a broadcast programme on 19th October, 1941, when the following question was asked of the Brains Trust: "Can you explain why so

many Scottish laws differ from those of England ? " The best available answer is contained in Lord Macmillan's volume, " Law and Other Things " in the paper " Scots Law as a Subject of Comparative Study." Information is available of course, elsewhere, but for the layman, such as the inquirer, who takes an interest in the subject it would be difficult to find a more satisfactory or more readable reply.

NOTICES OF BOOKS.

THE GROWTH OF THE BRITISH CIVIL SERVICE, 1780–1939.[1]

THIS is a useful and exhaustive analysis of the development of the modern British Civil Service, compiled from official records. It makes no pretension to be a critical study of the Service in its functional aspects, but as a well-documented description of the stages of its history and of the vicissitudes which have marked its progress during the past century and a half nothing could be better. The examination of the formidable array of blue books, of which a list is given in an Appendix, must have been a task fitted to daunt the most resolute researcher, but from those forbidding volumes the author appears to have extracted all that is vital and she has thereby relieved future investigators of much drudgery.

The improvements effected in the organization and methods of the Civil Service during the period covered have been nothing short of revolutionary. The main objects pursued in the process of reform were the abolition of sinecures, the elimination of corruption and peculation, the institution of adequate audit and control of public expenditure, the substitution of open examination for entrants in place of patronage, the revision of remuneration and the introduction of superannuation, the regulation of promotion and of working conditions, and the removal of the barriers and jealousies which divided the various departments. The steps by which these objects were slowly attained, despite much opposition and controversy, and generally by compromise rather than by logic, are clearly set forth and furnish an instructive illustration of the British way of doing things.

Some, though not the addicts of Pepys' Diary, may be surprised to learn how comparatively recent has been the achievement of the high standards of integrity and efficiency which characterize the present Civil Service. A primary cause of its defects in former times was the system of patronage in the making of appointments. This died hard. The proposals to abolish it were viewed with reluctance and dismay by the political party managers, for, as Greville wrote in his Memoirs so late as 1856, "patronage has been the great instrument of keeping parties together." "Jobbing is a part, though an ugly part, of the price which a free people pay for their constitutional liberty"—so said the Right Hon. Henry Unwin Addington, late Under-Secretary of State for the Foreign Department, as recorded in the Parliamentary Papers for 1854–55. This view was far from being shared by Sir Stafford Northcote and Sir Charles Trevelyan, who were the most trenchant critics of the prevailing abuses and the most persistent and effective advocates of reform. It was largely due to their efforts, though it was not till 1870, that the famous Order in Council of that year was promulgated which first authorized the selection

[1] *The Growth of the British Civil Service*, 1780-1939. By Emmeline W. Cohen. (London: George Allen & Unwin, Ltd., 1941.) Pp. 221. 10*s*. 6*d*. net.

of Civil Servants by open competitive examinations and initiated the modern method of appointment which, on the whole, has amply justified itself. How scandalous were the old methods may be judged from a Treasury Minute of 1836, which expressed the view that it was desirable that nominees for appointment as Customs officers should know how to read and write and do simple arithmetic!

The resistance of the Civil Service to innovations is exemplified by numerous instances. In 1780 Exchequer accounts were still being framed in Latin, wooden tallies were used till late in the reign of George III, and the introduction of shorthand and typewriting was long and stoutly opposed. In 1881 the Education Department and the Post Office suggested the inclusion of shorthand as an optional subject in the Lower Division examination, but the Treasury found that the time was inopportune—how familiar is the hallowed formula!—and it was not till 1938 that this sensible step was taken. Sir Algernon West, Chairman of the Board of Inland Revenue, introduced typewriting machines in his Department in the eighteen-eighties, " after a battle royal with the Treasury." In 1888 there was one " female typewriter " in the Foreign Office, the Admiralty had one machine but no one to operate it, there was none in the Treasury. But perhaps the greatest innovation of all was the admission of women to the Civil Service, which dates from 1870.

The growth in the numbers of the Service has been enormous. A list of public offices in the United Kingdom in 1797 gives the number of persons then employed as under 16,000. In 1938 the number had risen to 376,491, having more than trebled since 1902. This has been brought about chiefly by the vast expansion in our day of the State's activities in every sphere of life. During the last two years the Civil Service has been passing through a testing time and in the emergencies of war some of the defects inherent in its methods and traditions have been painfully conspicuous, and have not escaped just criticism. The Civil Service mind, with its devotion to routine and its policy of safety first, does not readily address itself to the adventure of war. Few, however, will be inclined to dispute the author's moderate conclusion when she says that " it may fairly be claimed that the Service has shown itself capable of adaptation to changing circumstances," and that " it remains one of the most characteristic of British constitutional and political institutions." For one thing, among many, we may be devoutly thankful—that we have escaped the evil system of the totalitarian States, in which all officials in responsible administrative positions must be active party politicians.

M.

MAJORITY RULE IN INTERNATIONAL ORGANIZATION.[1]

THIS book is a successor to a study published by Professor Riches eight years ago on *The Unanimity Rule and the League of Nations*—a work of considerable usefulness and scholarly attainment. In the present monograph, whose object is succinctly indicated in the title, Professor Riches has pursued the same method of careful and critical analysis which served him so well in his former work. After an interesting survey of the history of the majority rule within the State and in international

[1] *Majority Rule in International Organization.* A Study of the Trend from Unanimity to Majority Decision. By Cromwell A. Riches. (Baltimore: The John Hopkins Press, 1940.) Pp. 332. $2.75.

relations, he gives a detailed account of the working of the unanimity rule at the conferences of public unions like the Union for Protection of Industrial Property or the International Institution of Agriculture. He then surveys the tendencies towards a majority vote at conferences of international unions, such as the Universal Postal Union, entrusted with the revision of the principal convention and with the framing of detailed regulations and arrangements. There follows an account of the working of international bodies, like the International Labour Organisation, which have the power to frame new conventions or revise existing rules by a majority vote binding upon States which subsequently express their consent by the formal ratification of decisions thus taken. Another chapter describes the organization of the majority rule in institutions like the Permanent Sugar Commission or the Permanent Central Opium Board entrusted with executive functions of supervision and of enforcing, by appropriate sanctions, the obligations of the convention. The book concludes with chapters on decisions in international bodies controlling territory, in international river commissions and in administrative and technical commissions. In a general chapter Professor Riches traces the development from rigid equality to qualitative representation.

The learned author leaves the reader in no doubt about his own view as to what constitutes a desirable change in the existing practice, but he never allows his opinion *de lege ferenda* to obscure the statement of the actual position. There ought to be no question as to the timeliness of studies like that undertaken by Professor Riches. The creation of an international organ or organs with truly legislative functions embracing the totality of relations of States and including the power to effect changes in existing legal rights is the central problem of international organization. It is probable that, in the absence of such organs, any progress in the vital spheres of compulsory jurisdiction of international tribunals or of effective enforcement of international law will in the long run prove illusory. Professor Riches, by providing a scholarly and balanced study of one phase of this concrete problem, has earned the gratitude of all students of international law and relations.

H. L.

RESPONSIBILITY OF STATES FOR ACTS OF UNSUCCESSFUL INSURGENT GOVERNMENTS.[1]

"It is a settled rule of International Law that the State is responsible for acts of insurgent Governments which ultimately succeed in establishing themselves in power as the government. Responsibility for acts of unsuccessful governments, however, is more difficult to determine." In these opening sentences of the Preface the author gives the measure of the task which he has set himself in this interesting monograph, appearing in the series of Studies in History, Economics and Public Law, edited by the Faculty of Political Science of Columbia University.

The book is divided into five chapters, dealing respectively with insurgent loans, concessions and alienations, acts of government, routine, taxes and Customs duties and tortious acts. If an attempt may be permitted to state very briefly the general nature of the conclusions which

[1] *Responsibility of States for Acts of Unsuccessful Insurgent Governments.* By Haig Silvanie. (New York: Columbia University Press. London: P. S. King & Son.) Pp. 223. 11s.

the author reaches, it may be said that things done by insurgent governments *qua* insurgents involve no liability on the community against the established government of which the insurgency is directed, while, on the other hand, acts done in the normal routine of government or in discharge of the proper duties of a government are recognized as valid even after the collapse of the insurrection. With these conclusions there will be general agreement.

Much light has been thrown upon this subject by the recent American arbitrations between the United States and Mexico. The tendency of the decisions in these arbitrations has been to extend the one important exception formerly recognized to the general rule of the invalidity of the acts of unsuccessful insurgents (the exception of taxes and Customs duties collected by insurgents), to cover also acts of governmental routine, including ordinary commercial contracts, and also discretionary acts benefiting the State, such as a loan used to meet the maturing obligations of the State, or a forceable taking of property for the use of a starving population of a city or town under insurgent control. Such acts are sharply distinguishable from insurgent acts done in aid of rebellion, such as the purchase of arms and munitions, the borrowing of money for civil war purposes, and the granting of concessions and forceable taking of property used to support the insurgent government. In certain cases even a wrongful act might become binding upon the State if it had been done in such a manner as to confer a benefit upon the population affected.

There may perhaps be a question whether the liability of the State, in cases where it is held liable, is best expressed by the use of the word "responsibility." There may be a difficulty in regarding the State in the light of a principal represented by an insurgent government. The insurgent government certainly does not represent or consider itself as the agent of the *government* in power which it is striving to overthrow. But whatever conclusion is reached on this theoretical point, the practical effect of what is done by the insurgent government, and subsequently adopted by the established government, is the same.

Dr. Silvanie has written a careful and attractive treatise on a subject which, so far as the reviewer is aware, has not been treated elsewhere. English and Irish readers will note with interest the mention of the cases in Ireland and New York resulting from the loan raised in the United States in 1919 and 1920 in support of the movement to establish an independent Irish Republic.

J. F. W.

CONSTITUTIONALISM.

Professor McIlwain and Dr. Jennings are dealing respectively with the theory and practice of constitutionalism.[1]. The former has published a book which consisted in its original form of six lectures delivered at Cornell University. It is a brilliant summary of the development of the constitutional idea in Europe, and a contribution which will enhance still further his reputation as a student of political science. The depth of his scholarship and the breadth of his judgment have combined to throw

[1] *Constitutionalism.* By Charles Howard McIlwain. (Cornell University Press.) $2.50.

The British Constitution. By Ivor Jennings. (Cambridge University Press.) 8*s.* 6*d.*

new lights on European history, and provide a volume with the freshness of an original story.

The successful constitution is born of a people's experience, and Professor McIlwain begins with the time-honoured reference to Arthur Young's contempt for a constitution " made as a pudding from a recipe." After a discussion of the Greek conceptions of government he comes to his central theme—the vital contribution of Rome to our modern democratic institutions. He sees in the law and equity of Rome the origins of the common law which is the bulwark of our political freedom—a refreshing thesis after the long line of Germanic historians in the last century. In the chapter on the Middle Ages he discusses and develops the distinction between " jurisdictio " and " gubernaculum " which runs like a thread through the book, but it is in the fifth chapter on the transition to the modern world that the freshness of his judgments seems most arresting. We English are too accustomed to regard the early seventeenth century as the period of greatest tension between law and despotic rule, but Professor McIlwain puts the crucial period a century earlier and points to the days of Machiavelli and Luther, Henry VIII and Francis I. His excerpt from Tyndale—of all men a believer in the right divine!—is interesting and little known: " Hereby seest thou that the kyng is in thys worlde without lawe, and may at his lust doe right or wrong. . . . For he is ordeined to take vengeaunce and hath a sword in his hand and not pecockes feethers. Fear him therefore and looke on hym as thou wouldest looke on a sharpe sword that hangeth over thy head by an heare." Professor McIlwain suggests that mediæval constitutionalism would never have survived had it not been for the schism in the Church, whereby issues were confused and the cause of individual rights was re-asserted in a new form by the Protestants. This idea leads to an interesting train of thought in connexion with the English Reformation. Since by the early seventeenth century the rest of Europe was well on its way—in spite of the schism—to losing all its constitutional forms of government, it seems an obvious deduction that their survival in England had some connexion with the Anglican Settlement. Hooker has surely some contribution to make at this juncture, and it must be remembered that the church of Charles and Laud was also the church of John Hampden.

Turning to Dr. Jennings' book on the British constitution we find that he does not mention the Church at all. His book is not a history but a study of our constitution as it works to-day, nevertheless the Established Church is so much a part of our institutions that it deserves at least a passing reference. A more astonishing omission is the Judiciary. Turning from Professor McIlwain's right emphasis on the common law as the guarantee of individual liberty such a silence is all the more striking. Dr. Jennings' book deals with the machinery of Parliament, the Cabinet, and the Monarchy, and as far as it goes makes excellent reading, as well for its sound and balanced arguments as for its comments—expressed or implied—on contemporary politics. It is a political exposition written in 1941 rather than a survey of our constitution. The theme is detached from its historical context, but a chapter on the Judiciary would—if for no other reason—have done much to redress the balance. The title and nature of the book hardly give Dr. Jennings' scholarship the scope which it deserves.

G. M. Jerred.

CONSTITUTIONAL GOVERNMENT IN NEWFOUNDLAND, 1783–1832.

Dr. McLintock has produced a pioneer work of great interest and importance in an unexplored field of British colonial history.[1] Previous historians of Newfoundland have been hampered by the fact that the official documents relating to the island have been closed to public inspection until quite recently owing to the existence of protracted and acrimonious international disputes concerning fishing rights round the island's coasts. Particularly serious were the disputes between England and France, and these disputes, which can be dated from the time of the Treaty of Utrecht, 1713, if not earlier, were not finally settled until the conclusion of the Anglo-French Entente of 1904.

Newfoundland, discovered in 1497 by John Cabot—who received £10 from Henry VII for his achievement—was for long valued solely on account of its fisheries. For many years no attempt was made to colonize it, and it remained under Admiralty control. When at last permanent settlement was attempted, the efforts of the would-be colonists were severely discouraged by the naval authorities and by the British Government, because of the international complications that this caused. The colonists, however, in spite of official discouragement, persisted and at last succeeded in securing governmental recognition. As Dr. McLintock says:—

> "Without question the fifty years period after 1783 is the most important in the island's history, for it marked the transition from a struggling community of a few thousand fishermen into a flourishing colony which received the gift of representative government in 1832."

Among the hitherto unknown official documents which Dr. McLintock quotes in the course of his thesis is a most remarkable Report by James Stephen on the Suggested Form of the Legislation for Newfoundland, dated December 19, 1831. It is not unworthy to rank with the famous Durham Report respecting Canada framed some ten years later.

Dr. McLintock is to be congratulated on having produced a work of striking originality and unusual interest. He has succeeded, too, in presenting his information in an excellent literary style.

F. J. C. Hearnshaw.

THE EFFECT OF WAR ON CONTRACTS.

Dr. Webber's book on the effect of war on contracts[2] is an excellent and necessary work on an important and topical subject, for which the author was awarded the degree of Doctor of Laws of the University of Manchester. The work is well arranged and easy to refer to; the printing and spacing are well calculated to assist the reader in his task; there are useful summaries, rather in the manner made popular by Dr. Cheshire, at the beginning of each chapter.

The book falls into three divisions; the first dealing with the effect of war on contracts made with persons who become enemy aliens (67 pp.),

[1] *The Establishment of Constitutional Government in Newfoundland*, 1783–1832. By A. H. McLintock. (London: Longmans Green & Co.) Pp. xiii, 246. 15*s*.

[2] *Effect of War on Contracts*. By George Webber, LL.D. (London: Solicitors' Law Stationery Society). Pp. xliii, 568.

the second, which explains the effect of war on most types of commercial contracts (132 pp.), and the third and most interesting section, which surveys the controversial doctrine of " frustration of adventure " (270 pp.).

The first part of the book inevitably expounds problems rarely treated outside works on public international law, and is a testimony to the need for ordinary private lawyers not to take too narrow a view of their field, and to face public international law problems when they occur, as occur they will, in the midst of " private law " matters. The old conception of the Law of Nations, which did not attempt to divide the international law into public and private international law, is indeed proving to be more adequate to the needs of our times than the nineteenth century theories of international lawyers and legal philosophers who made such a division. The freezing of German assets (p. 35), for instance, has public and private legal consequences, like all forms of expropriation ; it is not a problem to be regarded in blinkers, as Dr. Webber shows. Again, if a German proclamation cancelling interest on debts due to enemies " is not conformable to the usage of nations " (p. 54), then courts of justice will disregard it, and even requisitioning powers, under Defence (General) Regulations, 1939, will be interpreted in accordance with the law of nations (see p. 123) ; certainly, the possession of a foreign friendly sovereign will not normally be interfered with without special reason, though it might, we suggest, be attacked on the ground of reprisals, which are a peacetime, as well as a wartime, institution.

The section on insurance is particularly interesting and important in view of the full treatment of the War Risks Insurance Act, 1939, though, incidentally, some curious points are brought to light in footnotes, such as that on Lord Mansfield's application of the theory of causation to problems raised by the insurance of slaves in the eighteenth century.

The importance of the Emergency Powers (Defence) Act, 1940, is rightly stressed. It is a statute which, as Dr. Webber says, " in one operative section, and by three lines—brings within the potential control of His Majesty every person and all property within the realm." Unpleasant and difficult as it is, no lawyer or law student can disregard the repercussions of the vast amount of administrative law on the law of contract ; this was pointed out in the Journal of the Society of Public Teachers of Law in 1938, and it is even more true to-day. Dr. Webber has performed a difficult task in keeping abreast with all the new subordinate, and sub-subordinate wartime legislation ; but it will be inevitably necessary for him to issue a supplement dealing once more with this matter in the near future.

The part of the book which deals with frustration of adventure is the most stimulating and the most provocative. It is really a complete recension of Anglo-American judicial and academic doctrine on the subject, displayed with great care and completeness. Deficiencies of our English law of frustration and, in particular, the refusal of the English courts to allow repayment of money paid before frustration, is rightly condemned in the light of comparative law, which in this case undoubtedly sheds a clearer light on the problems of elementary justice involved. It is sad to think that English Equity, in spite of its many contributions by way of correcting the common law, has failed here. But it is refreshing to see Dr. Webber's citation of the many passages which show how necessary some doctrine of frustration is, if justice is even to be attempted when an unexpected event destroys the basis of a contract. " Frustra-

tion" is a device by which the rules as to "absolute contracts," says Lord Sumner, "are reconciled with a special exception which justice demands" (p. 270).

The close connexion between frustration and unjustified enrichment has not been as adequately faced in English law as it has been in Scotland. The maxim, "*nemo debet locupletior fieri damno alieno*," ought to be capable of a much wider interpretation in England when the connexion between the two doctrines has been more emphasized. It is now, however, necessary in a plea of frustration for the person raising it to show that the *damnum* was caused without his negligence. In this respect the House of Lords has recently reversed the decision of the Court of Appeal in *Constantine* (*Joseph*) *Steamship Line, Limited* v. *Imperial Smelting Corporation Limited* (1941) E.R. 165; here Dr. Webber's thesis must be reviewed (p. 422). But this is only one point, and it is pardonable to err with Scott and Goddard, L.JJ. and Greene, MR. We must, however, admit Dr. Webber's main thesis, that frustration does not so much involve an implied term or condition as a "*constructive* term or condition imputed by a rule of law, and imputed by the court to the parties, irrespective of their intention. This contract belongs to the province, not of contract, but of quasi-contract." In other words, frustration is imputed to parties in very much the same way as in domicil; it may be done even against the apparent express words of a party.

We agree, too, that the rule which forbids "*pro rata*" freight seems unsatisfactory (p. 495), but we think it does not, like some other rules of frustration, operate unfairly, because the practice of insuring freight is general. Maritime cases, which so often involve insurance law and practice, must, we feel, on no account be taken as a general precedent on the question of frustration in those cases where provision of disaster by insurance is not the usual practice of reasonable men.

In conclusion, we commend this comprehensive book to student and practitioner alike; in it the law is stated, and it is stated with a wealth of learning and suggestion.

B. A. Wortley.

THE INTERNATIONAL CONFERENCES OF AMERICAN STATES.[1]

The Carnegie Endowment for International Peace have published the first supplement to the proceedings of the International Conferences of American States. It contains the conventions, recommendations, resolutions and motions adopted by the seventh and eighth International Conferences of the American States, the Inter-American Conference for the Maintenance of Peace, and the first and second meetings of the Ministers of Foreign Affairs of the American Republics for Consultations, at Panama and Habana, together with documents relating to the organization of the conferences and information concerning technical Pan-American conferences, commissions and other bodies. It has been published at the present time as a contribution to the celebration of the fiftieth anniversary of the Pan-American Union, in which Mr. Andrew Carnegie took a personal interest and for which he contributed a large sum to the con-

[1] *The International Conferences of American States.* First Supplement, 1933–1940. (Washington: Carnegie Endowment for International Peace, Columbia University Press.) Pp. xxviii, 558. $3.50.

struction of the building. The volume is also of especial value because it contains an appendix with particulars of the conferences dealing with Latin American affairs. Under present conditions the movement to bring together the South American States in co-operation with the United States which found expression in the Pan-American Union, has received an exceptional stimulus, and it may be anticipated that in the realms of law and commerce, as well as defence, there will be closer co-operation. The Pan-American Union began, in fact, as a commercial community, and the American Republics, like the various parts of the British Empire, have recognized that unity of law makes its contribution to the development of commercial relations. The synopsis of the activities of various Pan-American commissions and other bodies shows the extent to which they have been concerned with a variety of subjects, including aeronautics, commercial and financial matters, communications, intellectuel co-operation in a number of educational and scientific fields, international peace, legal developments in the fields of both international and municipal law, medicine and health, trade marks and copyright, and various problems in the economic and social fields.

From the conclusions of the various conferences Mr. G. A. Finch deduces that certain legal doctrines have become recognized as fundamental to the Pan-American system. The American Republics have repeatedly insisted that international relations must be conducted in accordance with the rules of international law, and as a co-relative doctrine that international disputes must be settled by pacific methods available under international law. The Conferences have repeatedly repudiated the so-called rights of aggression and conquest, and similarly they have upheld the doctrine of non-intervention by expressly declaring that no nation possesses a right to intervene in the external or internal affairs of another State. In the Pan-American system the importance is clear of the doctrine of juridical equality of States according to which all States, large or small, possess the same rights and equal legal capacity, irrespective of the power or wealth in the exercise of those rights. As a final basic doctrine Mr. Finch finds that the American Republics stand for the sanctity of international treaties. It will be clear, therefore, from his conclusions that although this volume is primarily one of documentary material it contains a good deal of information of practical interest and value at the present time.

TULANE LAW REVIEW.

THE current number of this review,[1] published by the Tulane University of Louisiana, contains many contributions of interest to students of comparative law. Mr. F. M. Lob deals with the interesting problem of "Seisin in the Civil Law and in Louisiana," and comes to the conclusion that "in Louisiana as well as in France seisin is essentially synonymous with possession."[2] Mr. Oppenheim traces "the sale of a hope" (*emptio rei speratae*) in Roman, French and Spanish Law and shows that "all three of the civil codes of Louisiana have recognised the sale of a hope."

[1] *Tulane Law Review.* (Vol. XV, No. 4, June, 1941.).

[2] Page 590. See for the origin of the maxim "le mort saisit le vif" *Chenon* Histoire du droit francais T II f. 1 Paris 1929 p. 223 sq. and for the transmission of property of the de cujus in European legal systems *Roguin* Traite de droit civil compare. Les successions U. V. p. 9059.

The author's statement that all authorities " agree that there can be sale of hope as Common Law seems too sweeping."[1]

Of very great interest is the paper by Phanor Edel on " the judicial status of non-resident foreign corporations in Panama." The law of some other Latin American countries on the subject was considered in earlier numbers of *The Tulane Law Review*. Mr. Edel's paper is very valuable as it gives not only the provisions of the Statute Law of Panama, but also the decisions of the Courts. One must agree with Mr. Edel that the law of Panama on the subject " is in a somewhat unsatisfactory condition " (p. 521).

There are other valuable contributions in the number under review to which we do not refer but which are of interest to students of comparative law.

V. R. IDELSON.

THE MADRAS LAW JOURNAL.

" THE Madras Law Journal," with the commencement of 1941, celebrated its fiftieth birthday. Throughout its history it has consistently set before itself the highest standards, not only in the realm of practitioners' law, but also in academic legal studies and in suggestions for legislation and reform. Its critical " Notes on Indian Cases " are always stimulating, and it must be very rarely that any important case which deserves criticism escapes notice. Its articles and other contributions contain sustained discussion of legal history and general legal problems on a scale which is unusual in India. The editorial chair of *The Madras Law Journal* has rightly been a stepping stone to the highest judicial honours. The Golden Jubilee number is well worthy of the occasion. Where the general standard is so high, it may seem invidious to single out particular articles, but it is impossible to refrain from expressing the pleasure derived in particular from reading Professor Venkatasubramanya Aiyar's article on " Three Pioneers in the British Evolution of Hindu Law," Rao Bahadur Krishnaswamy Aiyar's article on " The Judge," Mr. Govindarajulu's article on " Aspects of the Law of Homicide " and the two articles by Rao Bahadur Rangaswami Aiyangar on the digest-writer Lakshmidhara, which afford welcome evidence that the history of Hindu Law is not neglected and that those of its great writers who have escaped the attention of translators and consequently of the courts are receiving attention. It is by no means impossible that such studies may turn out to have a practical value. One can think of problems particularly in the law of adoption which might easily assume quite a different complexion if it could be shown, *e.g.*, that three great medieval Ministers such as Lakshmidhara, Hemadri and Madhavacharya concurred their views. All three have left voluminous Digests; and Hemadri's authority over the country which he ruled is borne out by local tradition, in which he still lives as a sort of compound of King Alfred, Merlin and Michael Scott. But what success might attend an attempt to get the

[1] Page 593. *Chalmers* Sale of Goods Act, 10 Ed. p. 28 points out that " there is very little English authority on the point," but quotes Martin B. saying in *Buddle* v. *Green* (1857, 27 L.S. Exch. at p. 34) " no doubt a man may buy the chance of obtaining goods." See also in Halsbury *Laws of England*, 2 Ed. V, XXIX p. 48 the statement " where the parties clearly intend it, there may be an emptio spei."

Courts to enlarge the very limited list of Sanskrit authors whose authority they are prepared to listen to, it is idle (though perhaps amusing) to speculate.

S. V. FG.

The following books have also been received : [1]

Reports and Decisions in the Supreme Court of British Guiana, 1939. Edited by E. Mortimer Duke. (Demerara, Georgetown : The Argosy Co., Government Printers.) Pp. xiv, 267.

Statutes and Decisions relating to the Control of the Dairy Industry. Contemporary Law Pamphlets (1940), Series 1. Edited by E. Fisher Brown, and Benjamin Werne. (New York University School of Law.) Pp. 59.

The Milk Research Council of New York have issued a volume containing the Statutes and Decisions relating to the control of the dairy industry. The necessity for legislation on the subject is now so well recognized that no one desires to raise the question of its constitutionality. The discussion now centres round the methods of putting it into operation, and in particular, the findings of the Milk Control Board. Material has been collected from the States of Illinois, Wisconsin and Virginia as well as New York, and the volume includes the decision upon labour relations as they affect the dairy industry.

John Eugene Harley, *World Wide Influences of the Cinema.* (Los Angeles : University of S. California Press.) Pp. xvi, 320.

Regulations of Hong Kong, 1937 edition, Vol. III, 1915-1931. Edited by J. A. Fraser. (Hong Kong : Government Printer, Noronha & Co., Ltd.) $100 Hong Kong currency.

Hong Kong War Emergency Legislation. Prepared by J. A. Fraser. (Hong Kong : Government Printer, Noronha & Co., Ltd.) Pp. xv, 209. $3 Hong Kong currency.

A useful volume of the special legislation dealing with the war emergency, together with regulations made to put it in operation has been prepared by the Editor of the 1937 Edition of the Hong Kong Regulations, of which the third volume is acknowledged above.

W. P. M. Kennedy, *Some Experiments in the Teaching of Law.* Reprint from the *Cambridge Law Journal.*

Julius Lewin, *A Short Survey of Native Law in South Africa.* Reprint from *Bantu Studies*, June 1941.

Statutes of the Dominion of New Zealand, 1940. (Wellington : Government Printer, E. V. Paul.) Pp. xviii, 398.

Saint Vincent, Ordinances, Orders, Rules and Regulations, and Proclamations for 1940. (St. Vincent : Government Printer.) Price, Ordinances—2*s.* 6*d.*; Orders, etc.—1*s.* 3*d.*

Revised Statutes of Saskatchewan, 1940, and *Statutes of Saskatchewan*, 1941. (Regina : King's Printer.)

[1] Mention here does not preclude review later.

Georg Schwarzenberger, *Power Politics*. (London: Johathan Cape.) Pp. 448. 21*s*.

Schuyler C. Wallace, *Federal Departmentalization*. A Critique of Theory of Organization. (Columbia University Press, Humphrey Milford.) Pp. ix, 251. 18*s*. 6*d*.

Sir Arnold Wilson, M.P., and G. S. Mackay, *Old Age Pensions*. (Oxford University Press.) Pp xx, 238. 16*s*.

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; The Arbitration Journal; Bombay Law Journal; Bombay Law Reporter; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; Hindustan Review; International Labour Office Bulletin; International Labour Review; Journal of the Parliaments of the Empire; Juridical Review; Law Quarterly Review; League of Nations Journal; Madras Law Journal; Medico-Legal Review; New York University Law Quarterly Review; Revue Internationale de la Croix Rouge; South African Law Journal; Toronto University Law Review; Wisconsin Law Review.

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